Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1134

UNITED STATES OF AMERICA

Appellee

—v.—

STATE of Montana; Department of Revenue of THE STATE of Montana; and W. A. Groff, Director of Revenue of and for the State of Montana, and his successors in office.

Appellants

On Appeal From the United States District Court for the District of Montana

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Docketed February 13, 1978
Probable Jurisdiction Noted May 22, 1978

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(The District Court Opinion is at pages 5-19; the Dissent pages 20-35; Montana Contractors' Gross Receipts Tax pages 38-48; *Kiewit & Sons, Inc. v. State Bd. of Equalization*, [Kiewit #1] pages 105-123 and *Kiewit & Sons, Inc. v. Department of Revenue*, [Kiewit #2] pages 124-130 in Appendix to Jurisdictional Statement.)

DOCKET ENTRIES

Civ. 1989 — U. S. v. State of Mont., Montana State Board of Equalization, et al.

No.	
1	Complaint
2	Motion for Preliminary Injunction
3	Affidavit of Edwin R. Fischer
4	Memorandum of law in support of plaintiff's motion for preliminary injunction
5	Request for Three Judge Court
6	Certificate & Request for Three-Judge Court
7	Summons (served)
8	Order designating Hon. James R. Browning, Hon. Russell E. Smith and Hon. William G. East to determine Cause
9	ANSWER OF DEFENDANTS
10	Defendants' Brief in opposition to Plaintiff's various claims
11	Affidavit
12	Requests for Admissions
13	Answers to Request for Admission
14	Request for Admissions
15	Stipulation of Facts
16	Defendants Answers to Plaintiff's Request for Admissions
17	Order setting Plaintiff's Motion for Preliminary Injunction for Hearing on May 24, 1971, at 10 AM at Billings

18 Stipulation for Continuance and Order for Continuance thereon, matter continued without date

19 Reporter's Notes

20 Notice of entry of Findings of Fact, Conclusions of Law and Judgment in State Court Action

21 Notice of entry of final judgment by Supreme Court of the State of Montana; Motions to dismiss federal district court action and to release all gross receipts tax funds from sequestration; Citations of Authorities

22 Government's Memorandum in opposition to defendants' Motions

23 Amended Stipulation with ORDER thereon for continuance without date

24 Deft's Renewal of Pending Motion to Dismiss & Motion to Abate Order for continuance

25 Government's Memorandum of Points & Authorities in opposition to defts' Motion to Dismiss

26 Motion & Order granting defts to and including Nov. 30, 1973 to file a Reply brief

27 Order setting hearing on Mot. to Dismiss on Jan. 21, 1974 at 10:00 AM

28 Reply Brief of Defendants in Support of their pending Motion to Dismiss

29 Motions for leave to specify additional ground for granting defts. pending motion to dismiss etc.

30 Notice of hearing motions

31 Affidavit of Robert A. Poore in support of motion to dismiss

32 Affidavits of Contractors performing construction work in the State of Montana for the United States

33 Order setting of hearing on defts' Motion to Dismiss is vacated; pltff shall within 30 days file & serve a brief devoted to the problems of res judicata & collateral estoppel. Defts. shall have 20 days to reply. All motions to dismiss and for summary judgment will be then deemed submitted

34 Government's Cross-Motion for Summary Judgment, cert. of serv.

Date	No.	Document
2-21-74	35	Plaintiff's Memorandum of Law (1) In further opposition to defendants' Motion to Dismiss, (2) in opposition to defendants' Motion to Dismiss, (2) in opposition to defendants' Motion for Summary Judgment based on *Res* Judicata or collateral estoppel, and (3) in support of its cross-motion for summ. Judgment
2-21-74	36	Affidavit of Sherman V. Lohn, Cert. of service attached to plaintiff's memorandum No. 35
2-20-74	37	Defendant's Second Reply Brief as directed & authorized by Court's Order of Jan. 16, 1974, certif. of service
3-14-74	38	Stipulation for ext. of time to file briefs of Deft. until April 1, 1974
3-14-74	39	Motion for Additional time to file brief to April 1, 1974
3-14-74	40	Cert. of Mailing on Mot. for additional time to file brief of Deft.

3-14-74	41	Order granting Defts. State of Mont. et al, to April 1, 1974 to file brief
4- 1-74	42	Defendants' Reply Brief with cert. of service and affidavit of James Madison attached
4-30-74	43	Plaintiff's Memorandum of Points and Authorities in Response to Defendants' Reply Brief, w/Cert. of service
11-20-74	44	Decision of 3 Judge Court and that cause be ret'd to further pre-trial procedures for delineation of Govern.'s specific constitutional claims in pre-trial order of issues by stip. or order
11-20-74	45	Order denying the several motions for summary judgment in favor of pltf. U.S.A. and defts. State of Mont, et al.
12-16-74	46	Order directing attys to hold pre-trial conf. by 1-10-75 to agree on statement of facts or outline discovery schedule for Court
2-11-75	*47	Pltf's Motion for Leave to Amend Complaint & Substitute Parties Defendant
2-11-75	48	Memorandum of Points & Authorities in Support of Motion for Leave to Amend Complaint
2-25-75	*47	Order allowing pltf. to amend complaint
2-25-75	49	Amended Complaint and substituted parties defendant
3-12-75	50	Certificate of Service of Govt's motion to amend Complaint, Memorandum in support thereof and Amended Complaint

3-17-75	51	Defts' ANSWER to Amended Compl. w/ Cert. of Serv. by Mail
3-18-75	52	Invitation to U.S.A. to attend & participate in Rules Change Hearing re. Mont. Contractors' Gross Receipts Tax Act w/ proposed amend. & notice of hearing attchd, together w/Cert. of Serv. by Mailing
4- 8-75	53	Order setting P.T. Conf., 9:20 a.m., 4-25-75, Msla.
5-28-75	54	Order, parties to submit proposed discovery schedule w/in 10 days
6- 6-75	55	Defts' Proposed Discovery Schedule w/ Cert. of Serv. by Mail.
6-30-75	56	USA Interrog. to Defts.
7-18-75	57	Prelim. PT Order, discovery schedule
7-31-75	58	Defendants' Responses to Plaintiff's Request for Admissions
7-31-75	59	Defendants' Answers and Objections to Plaintiff's Interrogatories w/Certificate of mailing
8-15-75	60	Defts' Request for Admission and Interrogatories
8-15-75	61	Defts' Notice to Take Depositions w/ cert. of service by mailing
8-21-75	62	Pltf's. Motion for Enlargement of Time; w/cert. of service attached. Ext of Time to complete discy. to 10-15-75
8-21-75	63	Memorandum of Points & Authorities in Support of Pltf's. Motion for Enlargement of Time

8-25-75	64	Order the pltf. conclude inspection of defts' records in Helena, MT by 10-17-75; pltf. conclude initial disvy. depositions by 10-17-75; all further discvy. be concluded by 11-3-75; a pre-trial conf. be held on 11-10-75; that a Stipulation by filed by 11-28-75
8-26-75	65	Statement of Counsel of Deft., State of Montana et al Pertinent to Pltff's. Motion to enlarge discovery time
10- 7-75	66	Pltff's Ans. & Obj. to Defts' Request for Admissions & Interrog.
10-16-75	67	ORDER, Pre-trial Sched. PT order due; 2-10-76
10-28-75	68	Deposition of James Madison
12- 3-75	69	Deposition of Merrill A. Moran
12- 3-75	70	Deposition of John E. Templeton
12- 3-75	71	Deposition of Leo Werre
12- 3-75	72	Deposition of Herbert B. Hallock
12-19-75	73	Deposition of George L. LaRue
12-22-75	74	Deposition of Phil E. Maronick
12-23-75	75	Deposition of Robert Burns McIntyre
12-29-75	76	Deposition of William R. Lowe
1-12-76	77	Order setting hearing 3-30-76, 10:00 a.m., Blgs.
1-14-76	78	Deposition of Philip Hauck
2-27-76	79	ORDER—Pre-trial schedule including Order that PT Order be mailed to Court by 2-27-76 by defts' attys

3-10-76	80	Order setting P.T. Conf. 3-18-76, 9:30 a.m., Msla.
3-17-76	81	Defts' Statement of Facts that Pltf. refused to Admit
3-22-76	82	Stipulation that Order concerning regulatory provisions of Mont. Act. to US & its contractors, be submitted to the Court for approval
3-22-76	83	Partial Judgment and Order
3-22-76	84	Order setting evidentiary hearing 3-30-76, 9:30 a.m. Msla and allowing parties 30 da (sic) following receipt of transcript to file briefs and 20 days reply briefs
3-30-76	85	Pltf's Statement of Facts that Defts refused to admit at P.T. Conf. and Request for further P.T. Conf.
3-30-76	86	Pre-Trial Order
6-14-76	87	Brief of Pltff.
6-14-76	88	Deft's Initial Brief After Trial
7- 2-76	89	Court Reporters Steno. Note, Proceedings: 3-30 & 31-75
	90	Proceedings 4-1-76
7-19-76	91	Reply brief of Pltff USA
7-19-76	92	State of Montana's Post-trial Answering or Second Brief
7-21-76	93	Order setting the above cause for hearing on Sept. 21, 1976 at 8:30 a.m. in the courtroom of the U. S. Dist. Court in Gt. Falls, MT before a three judge panel

8-24-76	94	Designation by Judge Browning, Chief Judge, 9th Circuit of panel of judges to hear matter
11- 9-76	95	Reporter's Transcript of hearing before 3-Judge panel
3-10-77	96	Court Reporter Notes
8-19-77	97	Decision by Judges East and Smith and Dissent by Judge Kilkenny
8-29-77	98	ORDER that Pltf prepare proposed judgment
9-20-77	99	Motion for Delay in Filing Judgment of Injunction
	100	Defts' Objections to Form of Proposed Judgment
10-12-77	101	Plaintiff's Response to Defendants' Motion for Stay of Judgment
10-18-77	102	ORDER that except as noted in majority's declaratory judgment & decree of injunctive relief file contemporaneously, defendants' several motions are each denied
10-18-77	103	Final Declaratory Judgment & Decree of Permanent Injunctive Relief
10-20-77	104	Court Reporter's (T. Canaan) Transcript of Proceedings of March 30, 1976, March 31, 1976 and April 1, 1976, in 3 volumes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants

COMPLAINT

Now comes the plaintiff, United States of America, by its attorney Otis L. Packwood, United States Attorney for the District of Montana, and complaining of the defendants alleges as follows:

1. This action is brought at the request of plaintiff's Department of the Army, and under the direction of the Attorney General of the United States, to protect the pecuniary interests and vindicate the sovereign rights of the United States.

2. The defendant State of Montana is a corporate sovereign and body politic. Defendant Montana State Board of Equalization (hereinafter referred to as "Board") is now, and at all times pertinent hereto was, an administrative agency of the State of Montana, created and existing under and by virtue of the provisions of Section 15 of Article III of the Constitution of Montana, and is, and at all times pertinent hereto was,

authorized and charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as "license fee statute"), relating to licenses and license fees for public contractors, and the rules and regulations promulgated thereunder. Defendant J. Morley Cooper is Chairman of defendant State Board of Equalization and together with John C. Alley and Ray J. Wayrynen as members, constitute the Montana State Board of Equalization.

3. Jurisdiction over this action is conferred on this Court by Sections 1331, 1345 and 2201 of Title 28, United States Code, since the matter in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs, and arises under the Constitution of the United States, and the action is commenced by the United States.

4. This suit is brought for the purpose of obtaining a declaratory judgment construing the application of the Federal Constitution and the laws of the United States, insofar as either or both are in conflict with and thereby prohibit the imposition, application, and enforcement of Chapter 35 of Title 84, Revised Codes of Montana, 1947 (as amended by Chapter 195 of the laws of 1967), and the rules and regulations promulgated thereunder, against the United States and its contractors and its subcontractors. Additionally, this suit is brought for the purpose of (a) enjoining, during the pendency of this action and permanently thereafter, the imposition, application, and enforcement of the Montana license fee statute, and the rules and regulations promulgated thereunder, against the United States and its contractors and its subcontractors; and (b) obtaining refund of taxes illegally imposed and collected from the United States and its contractors and its subcontractors.

5. In the performance of its governmental functions, plaintiff, United States has entered and will enter into contracts with, and has employed and will employ contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter and repair buildings, structures and installations for itself, its agencies and instrumentalities, including its Department of the Army.

6. Congress, in the Armed Services Procurement Act of 1947 (Title 10, United States Code, Sections 2301 to 2314, among others), and Government Procurement Regulations (32 CFR Sections 1.901 to 1.908-6, among others), has provided for standards or factors to determine and insure the fitness, qualifications, responsibility and reliability of persons and companies contracting with the Federal Government, including those construction contractors and subcontractors who are presently employed or under contract with the Federal Government in the State of Montana.

7. The Montana license fee statute, and the rules and regulations promulgated thereunder, require contractors and subcontractors, in order to submit bids or proposals to the Federal Government or enter into contracts with the Federal Government for performing public construction work or to perform their contractual obligations with the Federal Government (a) to obtain a Public Contractor's License (Section 84-3502 of the license fee statute provides that it is unlawful for a person to engage in the business or act as a public contractor in Montana without having a Public Contractor's License), (b) to be subject to licensing requirements and regulations and to meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore described federal stat-

ute and regulations, (c) to pay a license fee ($10 to $200), and (d) to pay an additional 1% license fee or tax on gross receipts derived from or measured by the value of contracts with the Federal Government.

8. At all times here relevant, defendants, by rulings, regulations and otherwise, have construed, imposed, and enforced and threaten to continue to impose and enforce the provisions of the Montana license fee statute, and the rules and regulations promulgated thereunder (which includes the collection of license fees or taxes), against such contractors and subcontractors who perform construction work or are under contract with the plaintiff, United States.

9. To avoid accumulation of interest and the imposition of penalties for nonpayment, such contractors and subcontractors have paid such fees or taxes to defendants in amounts in excess of $10,000 to date.

10. Plaintiff has incurred and will continue to incur liability for license fees or taxes imposed upon and collected by defendants from Federal contractors and subcontractors under authority of the Montana license fee statute in that plaintiff's contractors and subcontractors have passed and will continue to pass the cost of such taxes or license fees on to plaintiff because provisions of the contracts between plaintiff and said contractors and subcontractors require, and have required, and in accordance therewith, the United States has made, or has agreed to make, reimbursement to said contractors and subcontractors for the amounts remitted by them to defendants.

11. Upon information and belief, defendants have not imposed or enforced provisions and do not threaten to impose or enforce provisions which are similar to the Montana license fee statute, and rules and regulations

promulgated thereunder, against all contractors and subcontractors who perform construction work, nor do they threaten to do the same nor is there authority under any Montana statute to impose or enforce the same or similar provisions (which includes no authority for imposition or collection of license fees or taxes) against all contractors and subcontractors, or those contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations, or against those who perform any construction work other than public construction work.

12. The said license fees or taxes collected from plaintiff's contractors and subcontractors have been erroneously and illegally demanded, collected and received by defendants because the Montana license fee statute, the rules and regulations promulgated thereunder, and the defendant Board's construction and enforcement thereof have been and are erroneous, invalid, and without legal force or effect because they contravene the Constitution and laws of the United States of America in that they:

(a) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Gov-

ernment and its instruments from state control in the performance of their functions;

(e) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(f) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

13. Under the terms of agreements between the Government and its contractors and its subcontractors, the Government is entitled to the benefit of any recovery of any part of any said payments imposed, remitted to and received by defendants under authority of the Montana license fee statute, and the rules and regulations promulgated thereunder, and therefore, all said license fees or taxes which have been and will be unconstitutionally and illegally imposed and collected as hereinbefore alleged are, and will be, rightfully due, owing and payable to plaintiff as money had and received for its use and benefit.

14. Unless the defendants herein and all persons acting in concert with them are enjoined, during the pendency of this action and permanently thereafter, from acting as hereinbefore alleged (a) the plaintiff will suffer irreparable injury in that the operations of its agencies and instrumentalities, including its Department of the Army, will be harmed, delayed or impeded through the aforesaid illegal interference with and illegal regulation of contractors and subcontractors who perform construction work for or are under contract with the Federal Government; (b) multiple litigation will result since each of the many contractors and subcontractors employed by or under contract with the plaintiff, United States, in

Montana are required, and will be required, under Montana law to file individual claims or bring separate actions to contest the validity of these hereinbefore alleged illegally imposed and collected license fees or taxes each time they are paid over to defendants (within 30 days after each contractor or subcontractor receives each increment of payment); (c) the plaintiff will suffer irreparable injury in that no interest is provided for under Montana law on amounts of illegally collected taxes refunded by the State of Montana; (d) the plaintiff will suffer irreparable injury in that it is required under its contracts with its contractors to reimburse or pay its contractors and subcontractors all costs of contesting the validity of such hereinbefore mentioned illegal license fees, or taxes, including attorneys fees; (e) the plaintiff, its contractors and subcontractors will suffer irreparable injury if they do not comply with the hereinbefore alleged illegal license fee statute and regulations in that the license fee statute provides criminal penalties for noncompliance.

15. The relief prayed for herein requires this case to be heard by a Court of three judges.

WHEREFORE, plaintiff prays judgment:

1. Declaring that the Federal Constitution and laws of the United States are in conflict with and thereby prohibit the imposition, application and enforcement of the Montana license fee statute, and the rules and regulations promulgated thereunder, against the United States and its contractors, and its subcontractors because such statute, regulations, and defendant Board's enforcement thereof:

(a) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions;

(e) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(f) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

2. Restraining and enjoining defendants and all persons acting under their authority, during the pendency of this action and permanently thereafter, from enforcing the provisions of the Montana license fee statute, the rules and regulations promulgated thereunder, and from imposing, assessing or collecting such hereinbefore described license fees or taxes provided for by the license fee statute from contractors or subcontractors performing construction work or under contract with the Federal Government; and

3. Restraining and enjoining defendants and all persons acting under their authority, during the pendency of this action, from expending, disbursing or allotting the funds (in amounts as yet unknown) paid to defendants by plaintiff and its contractors and subcontractors under the license fee statute since January 1, 1967; or in lieu thereof, enter an order requiring defendants to deposit such funds with a disinterested third party (said depository or disinterested third party's reasonable fees and charges to be allowed by this Court for services) and provide that such third party shall invest and reinvest the same in interest bearing obligations of the United States of America, holding the same in this form collecting and accumulating interest thereon until the further order of this Court, or until the final determination of this cause.

4. Directing defendants to refund or pay to plaintiff, with interest, all such amounts or sums as have been paid to defendants by plaintiff and its contractors and its subcontractors under the license fee statute; and

5. Granting plaintiff such other and further relief as may be just and proper in the premises, together with plaintiff's costs and disbursements.

OTIS L. PACKWOOD
United States Attorney

By: Otis L. Packwood
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

ANSWER OF DEFENDANTS

Come now the defendants in the above-entitled action and for their Answer to plaintiff's Complaint on file herein, admit, deny and allege as follows:

1.

Answering the allegations of paragraph "1." thereof, defendants deny having sufficient knowledge or information to form a belief as to the truth thereof and therefore deny the same.

2.

Admit the allegations of paragraph "2." thereof, except that the enabling constitutional legislation for the creation of said Board is found in Section 15 of Article XII of the Constitution of the State of Montana.

3.

Answering the allegations of paragraph "3." thereof, defendants deny that jurisdiction is conferred on this

Court by Section 1331, Title 28, U. S. C., in that neither the statute in question nor the actions of the defendant Board have damaged the plaintiff in any dollar amount whatsoever and the required "matter in controversy" under Section 1331 is lacking. Deny that Section 2201, U. S. C. provides for jurisdiction and allege that it merely creates a remedy if jurisdiction is otherwise established. Admit that jurisdiction is conferred by Section 1345, Title 28, U. S. C., but in that regard allege that this Court should not exercise its jurisdiction but should adopt a position of abstention in favor of obtaining a final determination by the Supreme Court of Montana in the now-pending state court action of *Peter Kiewit & Sons, Inc., -vs- State Board of Equalization*, Cause No. 34859 of Lewis & Clark County and which said case involves the same issues as are here involved but was commenced prior to the institution of this case. Such abstention should be adopted because of the history of the legislation here involved (Chapter 35, Title 84, R. C. M. (1947)) as mirrored in the case of *Schultz-Lindsay -vs- State Board of Equalization*, 145 Mont. 380, 403 P.(2d) 635 (1965) wherein the Montana Supreme Court recognized the existence of certain tax inequities but found that the legislation involved in that decision had not attacked such inequities in a constitutional manner; and the following 1967 legislature enacted as a remedial measure the legislation being now attacked in this action but which the Montana Supreme Court has not yet reviewed.

4.

Answering the allegations of paragraph "4." thereof, defendants admit that in this suit plaintiff seeks the results enumerated in said paragraph. Deny that plaintiff is entitled to the declarations it seeks. Deny that taxes

were illegally imposed. Deny each and every allegation of said paragraph not herein specifically admitted.

5.

Admit the allegations of paragraphs "5." and "6." thereof.

6.

Answering the allegations of paragraph "7." thereof, defendants deny that contract bidders on Federal Government projects are required to obtain a Public Contractor's License in order to tender a bid. Admit that after the Federal Government has awarded a bid to any particular contractor the State of Montana requires that such contractor obtain a Public Contractor's License by paying a fixed, appropriate fee as provided by the statute here in question and become liable for future payment to the State of Montana of one (1%) per cent of the gross receipts of said contractor on the work actually performed within the State of Montana as a tax on the privilege of doing business within said State. Deny that the determination made by the Federal Government of the qualifications of its contractors is in anywise reviewed or altered by the defendants or that the defendants in anywise supervise the performance by said contractors of jobs with the Federal Government. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

7.

Answering the allegations of paragraph "8." thereof, defendants admit that they have administered and enforced and will continue to administer and enforce said license fee statute in the manner outlined in the foregoing paragraph "6." of this Answer and to impose and collect the fees or taxes specified in said act as to contractors or subcontractors performing work for the

United States within the State of Montana on lands not exclusively within the jurisdiction of the United States. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

8.

Answering the allegations of paragraph "9." thereof, defendants deny that penalty and/or interest are imposed on contractors or subcontractors. Admit that fees or taxes in excess of $10,000.00 have been paid to the State of Montana pursuant to said licensing act. Deny that the plaintiff has or should have any interest in said taxes so paid, and allege that such payment by contractors not a party to this action does not establish any amount in controversy under Section 1331, Title 28, U. S. C.. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

9.

Deny the allegations of paragraph "10." thereof. Specifically deny that said license fee statute is a tax upon the United States or its property or agents. Deny that the plaintiff is required to remit or pay anything whatsoever to the State of Montana. Allege that said tax (or license) is a tax upon the privilege of a contractor's doing business within the State of Montana and is imposed by the Montana Legislature in performance of its duties to equitably tax property in Montana for the support and maintenance of the State Government as authorized and directed by Article XII, Section 1, Montana Constitution. Deny that said tax-paying contractors are required by the act in question to pass the cost of such taxes on to the plaintiff in any sense other than that the tax is an item of the total cost of their doing business. Deny that any impact on the plaintiff is substantial or direct. Deny that the defendants at any time

required the plaintiff or any contractor with the plaintiff to have the plaintiff assume the tax on said contractors and, in that regard, allege that if the plaintiff contracted to do so, such contract is of the plaintiff's own election and volition and is not binding upon these defendants nor does it create an inconvenience, impact or effect on the plaintiff's operations which is binding upon the defendants or should be considered in these proceedings. Deny each and every allegation contained in said paragraph and not hereinbefore specifically admitted.

10.

Answering the allegations of paragraph "11." thereof, defendants admit that the act in question which they are administering and being Chapter 35 of Title 84, R.C.M. (1947) as amended was enacted in 1935, and at all times since then and presently it has had application only to Public Contractors and does not apply to Private Contractors. That there is a logical and well-recognized class of construction work known as "public works" and there is another logical and well-recognized class of construction work known as "private work". That the act is administered as to contractors engaged on public works within the State of Montana. That it is not administered as to contractors engaged in private works. That the statutory license fees and taxes provided by the 1967 amendment of the Public Contractors act is and will continue to be assessed against and collected from public contractors as to receipts from public contracts performed in Montana. That no immediately comparable fees or taxes are or will be assessed against contractors performing private contracts in Montana; however, because the Montana Corporation License Tax and/or Individual Income Tax and property taxes must be paid by private and public contractors alike and the fees and

taxes of Public Contractors under the act here in question are directly credited against such License Tax or Individual Income Tax and property taxes are refunded, the result is that contractors with private jobs, i.e., "private contractors" are taxed in substantially the same manner as "public contractors". Deny each and every allegation of said paragraph not hereinabove specifically admitted.

11.

Deny the allegations of paragraph "12." thereof.

12.

Deny the allegations of paragraph "13.", and in those regards allege that the act in question as passed by the Montana Legislature and administered by the defendant Board levies a tax on the public contractors as defined in said act. That if a public contractor pays a license or a gross receipts tax and the same has been improperly levied and collected in whole or in part by the defendant Board and was paid under protest by the contractor, a refund will be made to the taxpayer but to no other person, corporation or entity. Allege that if the plaintiff, United States Government, in some manner in the execution of its limited power delegated to it by the sovereign states under the United States Constitution has lawfully contracted with one or more independent contractors performing work for it in Montana to bring this action and to endeavor to obtain a repayment of taxes to any particular contractor plus his attorneys' fees or has contracted with such contractors to have them bring such action as appears to be alleged in paragraph "14." of plaintiff's Complaint, then such contract, if legal, was without the participation, knowledge or consent of the defendant Board and is nowise binding upon it. That any indebtedness or inconvenience the plaintiff has

assumed in these regards is voluntary to the plaintiff and is not required by the Act in question or by the administration of this defendant Board and in nowise creates or augments any impact of the administration of the Act upon lawful activities of the plaintiff.

13.

Deny the allegations of paragraph "14." thereof and allege that the Act in question was enacted and is being administered in accordance and in full conformity with the United States Constitution, the Constitution of the State of Montana and the rules of law pertinent to the implied supremacy of the lawful activities of the United States of America over tax measures of any particular sovereign state.

14.

Admit the allegations of paragraph "15." thereof.

15.

Deny each and every allegation contained in said Complaint and not hereinbefore specifically admitted.

DATED this 10th day of May, 1971.

ROBERT L. WOODAHL,
Attorney General of the State of Montana;
EDWARD JENE BELL, Tax Counsel, State Board of Equalization; and
POORE, McKENZIE & ROTH,
Special Assistant Attorneys General

By: Robert A. Poore
Attorneys for Defendants

Fourth Floor, Silver Bow Block,
Butte, Montana 59701.

(Acknowledgement of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,
Defendants.

ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS

The following are the replies of the Defendants abovenamed to the Request for Admissions made by the Plaintiff.

3. That no Montana law or regulation provides for a 1% gross receipts tax on private contractors and subcontractors.

ANSWER: Admit

(All Requests and Answers other than No. 3 omitted in printing).

STATE OF MONTANA)
County of Silver Bow) ss.

ROBERT A. POORE, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the defendant in the above-entitled matter. That in conference with attorney Edward Jene Bell, another of defendant's attorneys of record in this case, the foregoing answers to plaintiff's Request for Admissions have been prepared. That the answers contained in the above response to Request for Admissions of the plaintiff are true to the best of affiant's knowledge and belief.

ROBERT A. POORE

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTNA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

AFFIDAVIT OF ROBERT A. POORE IN SUPPORT OF MOTION TO DISMISS WHICH THE COURT MAY DECIDE TO TREAT AS A MOTION FOR SUMMARY JUDGMENT

STATE OF MONTANA)
County of Silver Bow) ss.

ROBERT A. POORE, first being duly sworn upon oath, deposes and says:

1. I am a Special Assistant Attorney General for the State of Montana and at all times pertinent to developments in the above-entitled matter was chief defense counsel of record for the defendants in the case of *Peter Kiewit Sons' Co. -vs- State Board of Equalization of the State of Montana, et al.*, which was Cause No. 34,859 of the files of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark. Also I was chief counsel of record for the Respondents in the appeal of the foregoing *Kiewit*

case to the Supreme Court of the State of Montana where such cause was No. 12,199 of said Supreme Court files. That each and all of the following described documents were part and parcel of the trial or preparation for trial or appeal in said *Kiewit* case and are true and correct copies of the originals used by the particular court — i.e., trial or appellate, to-wit:

A. **Group "A"**: Pleadings in State District Court *Kiewit* case:

1. Plaintiff's Complaint filed April 2, 1971.
2. Initial Appearance of Defendants by Motion to Strike filed May 4, 1971.
3. Defendants' Memorandum of Authorities in Support of Motion to Strike.
4. Plaintiff's Memorandum of Authorities in opposition to Defendants' Motion to Strike.
5. Court's Minute Entry of June 4, 1971, as to receiving oral argument by counsel on Motion to Strike and making Order denying such Motion.
6. Answer of Defendants filed June 16, 1971.
7. Set of 15 Interrogatories from Defendants to Plaintiff filed June 16, 1971.
8. Plaintiff's Answers and Objections to Defendants' Interrogatories filed July 6, 1971.
9. Defendants' Memorandum of Authorities in Opposition to Plaintiff's Objections to Defendants' Interrogatories.
10. Minute Entry of Argument on Plaintiff's Objections to Defendants' Interrogatories dated July 22, 1971. Objections sustained.

11. Set of 44 Requests for Admissions posed by plaintiff to defendants filed August 23, 1971.
12. Defendants' Responses to Plaintiff's Requests for Admissions filed September 17, 1971.
13. Notation of the filing of the discovery depositions of prospective witnesses Legg, Siverson and Pew on September 21, 1971.
14. Court's notation of September 21, 1971, setting date of trial for November 1, 1971.
15. Defendants' Motion to Compel Answers to Deposition Questions propounded to witness Ronald L. Legg filed September 24, 1971, and supporting Affidavit of Robert A. Poore, and Notice of Motion.
16. Memorandum of Authorities of Defendants in Support of Requiring deposition witness to answer questions.
17. Memorandum of Authorities of Plaintiff in Opposition to Requiring deposition witness to answer.
18. Minute Entry of oral argument of Court's Order of September 29, 1971, requiring witness to answer.
19. Set of four Interrogatories from plaintiff to defendants filed September 29, 1971.
20. Clerk's notation of October 12, 1971, of the filing of the discovery depositions taken by plaintiff of prospective witnesses Dolan and Lowe.
21. Defendants' Answers to Interrogatories posed by plaintiff and filed October 14, 1971.

22. Response by plaintiff to court's Order of September 29, 1971, requiring deposition answers.
23. Notation of October 20, 1971, of filing of plaintiff's discovery deposition as to witness Schye.
24. Defendants' Trial Brief.
25. Clerk's minute entries of the trial conducted before Hon. Victor H. Fall on November 1 and 2, 1971.
26. Plaintiff's Proposed Findings of Fact and Conclusions of Law filed November 22, 1971.
27. Defendants' Proposed Findings of Fact and Conclusions of Law filed November 22, 1971, and amended by Judge Fall (page 8) and thereupon adopted by the Court.
28. Court's Minute Entry of November 22, 1971, directing Defendants to Prepare and Submit form of Judgment.
29. Plaintiff's Post-Trial Memorandum.
30. Defendants' Post-Trial Memorandum.
31. Judgment made and entered November 30, 1971.
32. Notice of Entry of Judgment filed November 30, 1971.
33. Plaintiff's Exceptions and Objections to Findings of Fact and Conclusions of Law filed December 6, 1971.
34. Plaintiff's Motion to Amend and Make Additional Findings filed December 6, 1971.

35. Court's Order of December 13, 1971, after argument denying Plaintiff's pending Motions to Amend and Make Additional Findings.
36. Plaintiff's Notice of Appeal filed December 21, 1971.

B. **Group "B":** Documents in Montana Supreme Court *Kiewit* case:

1. Transcript (two volumes) of Testimony Taken at Trial.
2. Kiewit Contract No. DACW67-71-C-0027 of 11/10/70 with Department of Army.
3. Motion of U. S. Government for Leave to File Brief as Amicus Curiae.
4. Order of Chief Justice Granting U. S. Government's Motion to file amicus curiae brief dated April 3, 1972.
5. Motion of the United States to Participate in Oral Argument before Montana Supreme Court.
6. Order of Chief Justice Granting Oral Argument privilege to U. S. Government.
7. Appellant's Brief.
8. Respondents' Brief.
9. Brief of United States as Amicus Curiae.
10. Appellant's Reply Brief.
11. Respondents' post-argument letter of 12/8/72 to Supreme Court and citation of recently-decided Montana case.
12. Supreme Court Opinion.

C. **Group "C"**: Post-Judgment Proceedings in Montana Supreme Court:

1. Appellant's Petition for Rehearing dated January 18, 1973.
2. Appellant's Brief in Support of Petition for Rehearing.
3. Respondents' Objections to Petition for Rehearing.
4. Supreme Court Order denying Petition for Rehearing dated January 29, 1973.
5. Notice of Appeal to U. S. Supreme Court by Appellant.
6. Application to Associate Justice Douglas for Extension of Time to Docket Appeal dated April 12, 1973.
7. Motion of Appellant to Dismiss Appeal to the Supreme Court of the United States dated June 27, 1973.
8. Decree Dismissing Appeal.

Further affiant sayeth not.

ROBERT A. POORE

Subscribed and sworn to before me this 12th day of December, 1973.

MARCELLA HARGAN, Notary
Public for the State of Montana
Residing at Butte, Montana
My Commission expires
November 22, 1976

(Acknowledgement of Service omitted in printing)

(Documents Group A. Nos. 1, 6 and 27 included, remaining exhibits to Affidavit omitted in printing).

GROUP A No. 1

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

Civil No. 34859

PETER KIEWIT SONS' CO., a Corporation,
Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Peter Kiewit Sons' Co., a corporation, and complaining of the Defendants alleges as follows:

I.

That at all times pertinent hereto, Plaintiff was, has been and now is a corporation organized and existing under the laws of the State of Nebraska and authorized to do business in the State of Montana.

II.

That the Defendant, State Board of Equalization of the State of Montana (hereafter referred to as "Board") is now, and at all times pertinent hereto was, an administrative agency of the State of Montana, created and existing under and by virtue of the provisions of

Section 15 of Article III of the Constitution of Montana, and is, and at all times pertinent hereto was, charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as "license fee statute"), relating to licenses and license fees for public contractors, and the rules and regulations promulgated thereunder. Defendant J. Morley Cooper, is Chairman of Defendant State Board of Equalization and together with John C. Alley and Ray J. Wayrynen, as members, constitute the State Board of Equalization of Montana.

III.

That this action is brought pursuant to and in accordance with Chapter 45, Title 84 of the Revised Codes of Montana, 1947, as amended, to recover illegal license fees or taxes in the sum of Eight Thousand Seven Hundred Twenty-Six and 47/100 Dollars ($8,726.47) unlawfully imposed, demanded, and collected by Defendants from Plaintiff; and further, to have the unlawful and illegal license fee statute, under which the license fees are collected, declared void.

IV.

That the Plaintiff is now actively engaged in the business of performing construction contracts (including contracts with the Federal Government) in the State of Montana and intends in the future to continue to engage in such business.

V.

That the Fortieth Legislative Assembly of the State of Montana enacted Chapter 195 of the Laws of 1967 (now codified in Chapter 35, Title 84 of the Revised Codes of Montana, 1947). That Section 84-3502 of the Revised Codes of Montana, 1947, provides that it is unlawful for a person or business to engage in the business

or act in the capacity of a public contractor in Montana without having a Public Contractor's License.

VI.

That by the terms of the license fee statute (as amended by Chapter 195 of the Laws of 1967), Plaintiff (Peter Kiewit Sons' Co.) in order to be entitled to such aforementioned Public Contractor's License and in order to perform its contracts in Montana, is obligated (a) to meet State requirements, standards or grounds to determine fitness and responsibility which are similar in part to requirements, standards and grounds for determining responsibility and fitness under Federal law and regulations governing Federal procurement (Title 10, United States Code, Sections 2301 to 2314, among others; 32 CFR, Sections 1.90 to 1.908-6, among others), and (b) to pay to Defendant Board, an additional public contractor license fee in a sum equal to one percent (1%) of the gross receipts from public contracts from business sources within the state during the income year for which the license is issued.

VII.

That Defendant Board is charged with the duty of establishing rules and regulations necessary for the implementation and enforcement of said law, and the Board has construed, imposed and enforced the provisions of the license fee statute against Plaintiff and threatens to continue to do the same in the future (including collecting said license fees or taxes from Plaintiff).

VIII.

That upon information and belief, Defendants have not imposed or enforced provisions and do not threaten to impose or enforce provisions which are similar to the Montana license fee statute, and the rules and regula-

tions promulgated thereunder, against all contractors and subcontractors who perform construction work, nor do they threaten to do the same nor is there authority under any Montana statute to impose or enforce the same or similar provisions which are imposed against Plaintiff (which includes no authority for imposition or collection of license fees or taxes) against all contractors and subcontractors, or those contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations, or against those who perform any construction work other than public construction work.

IX.

That because of the aforementioned license fee statute, the Plaintiff was required to and did, on February 3, 1971 and on March 19, 1971, file Gross Receipts Withholding Reports with Defendant Board, and transmitted therewith payment in the amount of Two Thousand Seven Hundred Seventy and 32/100 Dollars ($2,770.32) and Five Thousand Nine Hundred and Fifty-Six and 15/100 Dollars ($5,956.15) respectively; that said sums were paid to Defendant Board under written protest in accordance with the provisions of Chapter 45, Title 84 of the Revised Codes of Montana, 1947; that copies of said written protests and Gross Receipts Withholding Reports are attached hereto and marked Exhibits "A", "B", "C", and "D", and by this reference made parts hereof.

X.

That the said license fees or taxes collected from Plaintiff have been erroneously and illegally demanded, collected, and received by Defendants because the Montana license fee statute, the rules and regulations promulgated thereunder, and the Defendant Board's construc-

tion thereof have been and are erroneous, invalid, and without legal force or effect because they contravene the constitutions and laws of the United States of America and the State of Montana in that they:

(a) illegally discriminate against the Plaintiff, the United States, and its agencies and instrumentalities, and those with whom the United States does business, and deny them due process of law and the equal protection of the laws;

(b) illegally impose a tax on Plaintiff which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Government and its instruments (including Plaintiff) from state control in the performance of their functions;

(e) illegally violate the Montana State Constitutional Prohibition against special laws;

(f) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(g) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

WHEREFORE, Plaintiff prays Judgment:

(1) For refund, with appropriate interest, of all said license fees or taxes erroneously remitted to and illegally

demanded and received by the Board from Plaintiff to date ($8,726.47).

(2) For a determination by the Court that Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended by Chapter 195, Laws of 1967, illegally violates (a) the constitution and laws of the State of Montana and (b) the constitution and laws of the United States, and therefore is void and of no force and effect;

(3) For Plaintiff's costs in this suit expended;

(4) For such other relief as to the Court may appear to be meet and just.

DATED this 2d day of April, 1971.

GARLINGTON, LOHN &
ROBINSON

By: Sherman V. Lohn
199 West Pine, P. O. Box 1471
Missoula, Montana 59801

Attorneys for Plaintiff

(Exhibits to Complaint omitted in printing)

GROUP A No. 6

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 34, 859

PETER KIEWIT SONS' CO., a Corporation,
Plaintiff,

-vs-

STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

ANSWER:

Come now the defendants in the above-entitled action and for their Answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

1.

Admit the allegations of paragraph "I." thereof.

2.

Admit the allegations of paragraph "II." thereof, except that the enabling constitutional legislation for the creation of said defendant Board is found in Section 15 of Article XII of the Constitution of the State of Montana.

3.

Answering the allegations of paragraph "III." thereof defendants admit that Chapter 45 of Title 84, R.C.M.

(1947 as amended) provides for the payment of taxes under protest and the institution of actions by taxpayers to recover the same. Deny that the license fees or taxes here involved as specified by plaintiff were illegally levied or collected. Deny that said license fee statute, Chapter 35 of Title 84, R.C.M. (1947, as amended) is void or unconstitutional. Deny each and every other allegation contained in said paragraph.

4.

Admit the allegations of paragraphs "IV." and "V." thereof.

5.

Answering the allegations of paragraph "VI." thereof defendants deny that any license is required by the State of Montana of a public contractor bidding on a federal project and in that regard alleges that only after such a bidder has obtained a contract is a Public Contractors License required. Deny that the defendant Board supervises or otherwise determines the fitness and responsibility of a contractor bidding on or performing a contract with the Federal Government. Admit that a public contractor performing a public contract in Montana is obligated pursuant to Section 84-3505, sub. (5) to pay a sum equal to one per cent (1%) of the gross receipts from such public contract. Deny each and every other allegation contained in said paragraph.

6.

Answering the allegations of paragraph "VII." thereof defendants admit that pursuant to the authority and direction contained in Section 83-3515 R.C.M. (1947, as amended) defendants have issued Regulations implementing said Chapter 35. Admit that the defendant Board has enforced and will continue to enforce the requirements of Section 83-3505(5) and to collect said 1%

gross receipts license fee or tax which the Montana Legislature lawfully and properly and pursuant to the mandate of Section 1, Article XII of the Montana Constitution levied upon the valuable property right of doing business in Montana. Deny that such tax is illegal or unconstitutional or that such anticipated collection constitutes a "threat." Deny each and every allegation contained in said paragraph not hereinabove specifically admitted.

7.

Answering the allegations of paragraphs "VIII." and "IX." thereof defendants admit that since the enactment of Chapter 35 of Title 84 in 1935 the State of Montana has classified contractors as either public contractors or private contractors and has defined the term "public contractor". Alleges that such classification of "public" and "private" (or non-public) is clear-cut and reasonable. Admits that all public contractors are required to pay the license fees (including the 1% gross receipts fee or tax) required by Section 84-3505(5) and to obey the provisions of said Chapter 35 as administered and interpreted by the defendant Board as set forth in its Regulations. Admit that contractors not within the well-defined and reasonable classification of "public contractors" are not subject to the license fees of Chapter 35, and that the defendants are not "threatening" to endeavor to subject such private or non-public contractors to the fees required of public contractors under Chapter 35. Allege that all contractors of a particular class (public or private) are treated by defendants in the same manner, and that because the Montana Corporation License Tax and/or Individual Income Tax and property taxes must be paid by private and *public* contractors alike and the fees and taxes of public contractors under the act here in question are directly credited against

such License Tax or Individual Income Tax, and property taxes are refunded, the result is that the contractors with private jobs (i.e., "private contractors") are taxed substantially in the same manner as "public contractors." Deny each and every allegation of said paragraph not hereinbefore specifically admitted.

8.

Deny the allegations of paragraph "X." thereof.

9.

Deny each and every allegation contained in said Complaint not hereinbefore specifically admitted.

WHEREFORE, defendants having fully answered pray that the plaintiff take nothing by virtue of its complaint and that its prayers for a declaration that Chapter 35 of Title 84 be declared void and unconstitutional be denied and that defendants be awarded their costs of suit incurred herein.

DATED this 15th day of June, 1971.

ROBERT L. WOODAHL,
Attorney General of the State
of Montana; EDWARD JENE
BELL, Tax Counsel, State
Board of Equalization; and
POORE, McKENZIE & ROTH,
Special Assistant Attorneys
General

By: Robert A. Poore
Attorneys for Defendants

(Certificate of Service omitted in Printing)

GROUP A No. 27

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 34,859

PETER KIEWIT SONS' CO.,
Plaintiff,

-vs-

STATE BOARD OF EQUALIZATION of the State of Montana, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN as members thereof,
Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial before the above-entitled Court sitting without a jury on Monday, November 1, 1971 and concluded on Tuesday, November 2, 1971. Messrs. Sherman V. Lohn and Lawrenc F. Daly of the law firm of Garlington, Lohn & Robinson of Missoula, Montana, appeared as counsel for the plaintiff; Edward Jene Bell, Esq., Tax Counsel for the State Board of Equalization, and Robert A. Poore of the law firm of Poore, McKenzie & Roth of Butte, Montana, as special Assistant Attorney General on behalf of Hon. Robert L. Woodahl, Attorney General for the State of Montana, appeared as counsel for the defendants.

And the parties having respectively produced evidence on the issues involved in the case and having respectively filed trial briefs and post trial briefs and memoranda on the legal issues involved; and the Court having now considered such evidence and being fully advised in the premises and having informed itself as to the applicable law, and the matter having been submitted to the Court for its decision,

NOW THEREFORE, pursuant to Rule 52, M.R. Civ. Pr. the Court now finds the facts to be as follows:

FINDINGS OF FACT

1. That at all times pertinent to this matter the Plaintiff, PETER KIEWITT SONS' CO., has been and now is a corporation organized and existing under the laws of the State of Nebraska with its principal office and headquarters at Omaha, Nebraska and authorized to do business in the State of Montana.

2. That the Defendant, STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA (hereinafter referred to as "Board") is now and at all times pertinent to this matter was an administrative agency of the State of Montana created and existing under and by virtue of the provisions of Section 15 of Article XII of the Constitution of the State of Montana, charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended and of the rules and regulations pertinent thereto as promulgated by the Board as directed in said Act (hereinafter referred to as "the Act") relating to licenses and license fees for public contractors. That defendant J. MORLEY COOPER is Chairman of said Board and together with Messrs. JOHN C. ALLEY and RAY J. WAYRYNEN constitute said Board.

3. That on October 9, 1970 the Plaintiff as an independent contractor was awarded contract #DACW67-00027 (4398) by the Department of the Army, Seattle District, Corps of Engineers of the United States of America, for the relocation of Montana Highway #37 on the Kootenai River, Libby Dam and Reservoir, Lincoln County, Montana. That the contract price for said job was $6,389,817.00. That in addition certain extra work to be performed at additional cost has been ordered by the Federal Government and has been performed by the Plaintiff as an independent contractor. That in the performance of said contract by the Plaintiff it was and is an independent contractor and was not and is not an employee or servant or agent of the Federal Government.

4. That in its performance of the federal contract referred to above the plaintiff is a "public contractor" within the definition of that term in the Act and in the regulations and rulings of the Board issued pursuant to Section 84-3515 of the Act.

5. That the Plaintiff was not required to possess or obtain a license under the Act in order to bid on and obtain the federal contract here in question; nor is any public contractor bidding on a federal job required by Montana law to have such a license prior to being awarded a contract by the federal government.

6. That after being awarded a federal contract for the performance of construction work in Montana a contractor is required to obtain an appropriate license under the provisions of Section 84-3505 of the Act for revenue accounting purposes, and the Plaintiff did obtain and have such a license.

7. That the defendant Board does not supervise the performance of a federal contract by a public contractor

in Montana or in any way interfere with the federal government's selection of its contractors to perform federal jobs in Montana, or in any way interfere with the federal government's supervision of such contractors' performance of their contracts. That the defendant Board in nowise participated in or in any way or to any degree controlled or limited the selection by the U. S. Government of the defendant for the Libby Dam contract here in question and at no time since the awarding of that contract to the plaintiff have the defendants in anywise supervised or controlled or hampered or impeded plaintiff's performance of such contract.

8. That the plaintiff entered upon its performance of the federal Libby Dam contract here involved and was paid installments on said contract price by the Federal Government as the work progressed. That pursuant to the requirements of Section 84-3505 of said Act the plaintiff paid one percent (1%) of its receipts from the Federal Government to the defendant State Board. Thus on or about April 22, 1971 when the plaintiff was paid the sum of $682,564.00 by the Federal Government, it in turn paid 1% thereof or $6,825.64 to the State Board; and when on or about May 25, 1971, it was paid the sum of $244,564.00, it in turn paid $2,447.89 thereof to the State Board. That such payments by the plaintiff were made under protest.

9. That the Federal Government did not make any payment whatsoever to the State Board of Equalization. That the Federal Government is not required to withhold any payments from a federal contractor in Montana or remit the same to the State Board, and in no instance does it do so. That all payments required by federal public contractors under the Act are made directly by the contractor; although on state jobs the state subdivision does withhold payments to the contractor and does remit the same to the State Board on his behalf.

10. That while the moneys with which the 1% gross receipts tax is paid doubtless come from the property owner (here Federal Government) on contracts that are performed at a profit, the tax does not by any means necessarily increase the cost to the property owner (Federal Government) of the project in question because the impact on the contractor of the tax after reduction for personal property and income taxes under Section 84-3514 of the Act is a small and insignificant one of many factors which determine the amount of a contractor's bid, which in turn, determine the contract price. That the contract price determines the cost of the project to the property owner. That in working up a bid to tender on a public contract, contractors list the estimated direct and indirect expenses that the job will entail. That to this total sum of estimated expenses is added an item called "margin" by the contractors. That "margin" is a fluid percentage which is controlled by the bidding contractor and varies from job to job. That on the Libby Dam project the margin that the plaintiff used was 46%. That included in such "margin" was an item of anticipated profit for the plaintiff of 18% of the total bid price. That the *net* gross receipts tax, if any, is a miniscule proportion of the variable margin figure because it must inevitably vary between a maximum of one (1%) percent of the gross contract price and a minimum of zero (0%) percent of such contract price. That since all public contractors have items of heavy equipment, or cars, trucks, etc., used on a project and which are subject to personal property taxes in Montana; and since all such personal property taxes are refundable dollar for dollar out of the 1% gross receipts tax, such tax in its final amount must be and is less than 1% of

the gross contract price. Furthermore, the contractor can use any portion of the 1% tax remaining after repayment of the personal property taxes as a dollar for dollar direct credit against income taxes. That in the Kiewit contract here in question the plaintiff paid $35,803.22 of personal property taxes to Lincoln County in 1971. That if the contract takes two more years to complete as is estimated; and if such personal property taxes average that amount each year, the personal property taxes on the job will total about $108,000.00. That if the anticipated job profit of 18% is reduced in this projection to a true net as low as 10% the plaintiff will still have a net income of approximately $640,000.00 on the whole job on which it will (per 1971 tax rates) pay a Montana corporation license (income) tax of 6¼% or $40,000. That the 1% gross receipts prepayment to the State Board will be $64,000. That such prepayments will be reduced (and actually wiped out) by the personal property taxes of $108,000.00. And if anything were still to be remaining (not here apparent) such remainder could be applied dollar for dollar in reduction of the income tax of $40,000. That the gross receipts tax, if any net remains, is such a minuscule proportion of the total bid and is so outweighed and outleveraged by the variable and flexible figures of "margin" and "estimated profit" (46% and 18% respectively under the Kiewit bid) as not to be a significant factor for a bidding contractor in arriving at his bid for the contract price — which is what controls the cost to the owner on any particular job. That the high-leveraged bidding items of margin and anticipated profit very substantially determine a bid, and in turn, the contract price; and such items are widely variable and totally within the control of the bidder and are governed by a number of considerations. That such considerations include how badly the contractor wants the job in order to keep crews and equipment working; who his competitive bidders are and how badly he believes they want the job; how close or convenient the job-site is, plus many other factors. That it cannot be said that the gross receipts tax here in question increases the cost of work to the owner. That if there is any economic impact in any given case it is insignificant, indirect and insubstantial.

11. That the Federal Government has caused this litigation to be commenced by the plaintiff and will pay the cost of the same — including a reasonable attorneys' fee — by virtue of the following provision (General Provision #58) in the Libby Dam contract here involved:

> "The Government reserves the right to direct the Contractor, and the Contractor in turn, shall reserve the right to direct all sub-contractors to take all necessary action to contest the validity of these fees (of the Act) and the contract price shall be equitably adjusted to cover the cost of such action, including reasonable attorneys' fees."

12. That the Federal Government has caused the following term to be inserted in the contract here in question:

> "The Act (citation) allows the license fee based on gross receipts to be used as a credit on: (1) the Contractor's corporation license tax (citation) or on Contractor's income tax (citation), depending upon the type of tax the Contractor (or subcontractor) is required to pay under the laws of the State of Montana; and (2) personal property taxes paid in Montana on personal property of the Contractor (or subcontractor) which is used in the business of the Contractor and is located within the State. THE CONTRACTOR, and, in turn, THE SUB-

CONTRACTOR WILL NOT TAKE ADVANTAGE OF THESE CREDITS." (emphasis supplied)

13. That the tax in question is applied to both prime contractors and sub-contractors, and works the same for each on any particular job. That it is the sub-contractor's bid which has a direct impact on determining the ultimate contract price paid by the property owner. That the 1% gross-receipts tax is a near or complete wash item as to sub-contractors just as it is with prime contractors and is not a measurable or significant item or consideration by the sub-contractors in determining and formulating their bids. That any impact through the sub-contractor on the Federal Government of the tax here in question is indirect and insubstantial and is not direct or consequential. That although on any particular job there may be a "pyramiding" of the inconsequentialities of the impact of the Act throughout a heirarchy of a prime plus a series of sub-contractors, the totality of such inconsequentialities is also inconsequential and indirect and is not direct or of consequence. Ten times zero is zero.

14. That there is a substantial and real difference between public and private contracts and between contractors performing public contracts (public contractors). That public contracts necessarily pertain to work on public property and involve the construction of structures for public use. That invariably public contracts must be bonded while private contractors need not be. Invariably public contractors must be supervised by a project engineer (or other official supervisor either state of federal) while private contractors need not be. As to public contracts the stability and durability of the projects (schools, dams, bridges, highways, stadiums, etc.) have direct impact on potentially great masses of the public while ordinarily

the quality of private construction has an impact only on a small portion of the public. An inexperienced contractor can bid or obtain a private job but not a public job. The classifications under the Act here in question between public and private contractors in no-wise involves or has a parallel between a classification of resident-vs-non-resident contractors. Thus, public contractors resident in Montana are treated exactly the same as non-resident public contractors. The same is true of private contractors either resident or non-resident. That the contractors have experienced no difficulty in recognizing the clear-cut and well-defined distinction between public works and private works and between contractors with public jobs and contractors with private jobs.

15. That the act in question has rendered the task of County Assessors in Montana in locating and fairly assessing personal property (heavy equipment of contractors) vastly more easy, efficient and fair. That the act also discourages unreasonable allocation of indirect costs (home office overhead and equipment rentals) to Montana projects by out-of-state contractors and so encourages a more fair determination of net income in Montana and payment of Montana income tax.

16. That the act in question has tended to equalize bidders at public bid-lettings in that before the act certain contractors (both in-state and out-of-state) were prone to "ignore" any impact of personal property taxes on equipment in Montana while other bidders offered bids that fully recognized the potential impact of such taxes. Furthermore, certain contractors were able to minimize Montana income tax by allocation of heavy home-office (out-of-state) overhead to a Montana project whereas other bidders would have to keep in mind when

bidding that Montana income taxes might well be incurred. That the act in question tends to very closely approximate the combination of both fair and realistic personal property plus income taxes and so promotes equality and fairness at public biddings.

17. That the tax is new and novel in Montana, and certain contractors initially were not aware of the credits (personal property and income tax) provided by the act and hence such credits were in part not claimed, and the residual fund with the State Board tended to grow. That there is also a certain amount of oversight or indifference by contractors in claiming refunds, and that also has tended to augment the tax residue with the State Board. Finally the incentives within the Act for disclosure of personal property and fair determination have not had a chance for full recognition and application in the scant four years since the enactment of the Act; but over the years to come will probably result in the Act's becoming a total or near-totally revenue enforcing (personal property and income tax) measure rather than revenue producing measure. That the present residue of tax with the State Board or State of Montana is not fairly representative of how the tax is likely to operate in the future years.

And from the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the subject matter and of the parties.

2. That the gross receipts tax provided for by the Act is not actually a tax at all in the sense of being a separate and distinct revenue-producing measure but rather is a tax-enforcing measure operating on the

estimated tax withholding concept whereby estimates of Montana personal property plus estimated Montana income taxes are initially deposited with the State Board by the taxpayer (public contractor) as the 1% gross receipts tax, and then later refunded in whole or large part when proof of payment of Montana personal property taxes and income taxes is made.

3. That the tax is not directly or indirectly levied upon the Federal Government.

4. That any impact of the tax upon the Federal Government is neither direct nor substantial but, if it exists in any particular circumstance, is inconsequential, indirect, and remote. That the purpose of the act in nowise is to levy any tax of any kind or in any measure upon the Federal Government, and it does not do so.

5. That the tax is directly levied upon public contractors and is wholly paid by them, and no tax is paid by or withheld by the Federal Government.

6. That the tax is a revenue-enforcing rather than a revenue producing measure and operates to encourage fair and just payment of personal property and Montana income (individual or corporate) taxes.

7. That any provision of the Act pertaining to passing upon or determining the qualifications or professional competence, fitness or responsibility of public contractors is wholly inapplicable to public contractors performing Federal Contracts in Montana. That the public good is adequately protected by having federal supervisors supervise and police federal jobs. That the inspection, supervision and professional qualifications provisions of the act pertain only to public contractors performing jobs for the State of Montana or subdivisions thereof or other (Montana) public entities but not the

Federal Government. That since such regulatory provisions are not applicable to public contractors with Federal jobs, neither the State Board of Equalization or any member or employee thereof has any power or authority to interfere with, impede, hinder, delay, stop or otherwise affect the performance by a federal contractor of a federal project in Montana. That the Act goes not illegally interfere with the Federal Government's power to select contractors and schedule construction and does not conflict with Federal law and policy regulating Federal procurement; nor does it constitute a review by the State of Montana over Federal determination of responsibility and fitness of its contractors or sub-contractors.

8. That the Act does not apply to or in anywise control or affect the selection by the Federal Government of its contractors or the manner in which they perform their contracts.

9. That the Act is relevant to public contractors performing federal contracts only in that after such a contractor has been awarded a federal contract he shall obtain a license for revenue reporting and accounting purposes only. No license is required or shall be required of a bidder on a federal project.

10. That the purpose of the act is to encourage and enforce payment of personal property taxes and Montana income taxes; and, over a period of years as familiarity with its credit mechanisms becomes better known and better applied, such credits will serve to "wash out" or fully equalize and eliminate the "tax" for all practical purposes and with any remaining balance being reasonably allocated to administration expense. However, the Federal Government has elected to include in its federal contracts a provision (General Provi-

sion 58) which provides that its federal contractors in Montana will not take advantage of the very credits which tend to reduce the "tax" to a wash item. That this attempt by the Federal Government to cause the act to appear to be a revenue producing measure and to cause it to appear to have some measurable or substantial economic impact upon contracting property owners (and particularly the Federal Government) does not accord with the admonition of the Supreme Court of the United States in the Case of *James* -vs- *Dravo Contracting Co.*, 302 U.S. 134, to the effect that each Sovereign, whether state or federal, must adopt a workable and practical attitude toward the other in areas where taxing power of either could interfere to some remote and inconsequential degree with the operations of the other sovereign and that neither should operate as to the other with a "chip on its shoulder."

11. That upon the giving of full credit for payment of personal property and Montana income taxes the "tax is substantially or totally a wash item and there is no measurable or substantial difference in tax treatment of public -vs- private contractors in Montana by virtue of the act.

12. That if the act did levy a measurable and substantial tax upon public contractors in Montana not borne by or levied upon private contractors in Montana, the Act would not thereby be rendered invalid because there is a real and substantial difference between the classification of public -vs- private contractor. Such classification is reasonable and natural and is founded upon a just and rational basis, rule and distinction. Such classification is in nowise arbitrary, oppressive, capricious, illusory or fanciful. The tax imposed is uniform upon the same class of subjects. There are

valid and sufficient reasons both tax-wise and public policy-wise for the legislative recognition of the distinctive classes. That good and sufficient reason exists justifying the Legislature's decision not to tax or regulate private contractors.

13. That the act in question is not invalid or unconstitutional.

14. That the taxes levied upon the plaintiff and paid under protest by the plaintiff were not improperly, illegally or unlawfully levied or collected and the plaintiff is not entitled to repayment of the same.

15. That the Act in question does not contravene the constitution or the laws of the United States of America.

16. That the Act in question does not contravene or violate the constitution or laws of the State of Montana.

17. That the Act does not discriminate against the plaintiff.

18. That the Act does not discriminate against or deny due process of law to the United States of America or its agencies or instrumentalities or those with whom it does business.

19. That the Act does not violate or infringe upon the immunity of the Federal Government or its instruments (including Plaintiff) from state (Montana) control in the performance of their functions.

20. That said Act is valid and enforceable and the regulations issued by the Board and being administered by it are likewise valid and enforceable and were properly adopted pursuant to Legislative authority and properly interpret and apply the Legislative intent as to said Act.

21. That the plaintiff is not entitled to any of its

prayers for relief, and defendants are entitled to judgment for their costs herein expended.

Let Judgment Be Accordingly Entered.

DATED this 22 day of November, 1971

VICTOR H. FALLS
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and KEITH COLBO, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

AMENDED COMPLAINT

Comes now the plaintiff, United States of America, by its attorney, Otis L. Packwood, United States Attorney for the District of Montana, and complains and alleges as follows:

THE ACTION, JURISDICTION AND PARTIES

1. This is a civil action instituted by the United States of America for the purpose of obtaining from the Court (1) a declaratory judgment ordering and adjudging that the Federal Constitution and the laws of the United States prohibit the imposition, application or enforcement of the provisions of the Montana Public Contractor's Licensing, Regulation, and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder (hereinafter sometimes referred to as the "Montana Act and

regulations") relating to both (a) the taxation and (b) the licensing and regulation of public contractors or all public construction work performed in the State of Montana, as to the United States of America, its contractors, subcontractors, or those with whom it deals, (2) a permanent injunction against the defendants and those in concert with them from imposing, applying or enforcing both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act against the United States of America, its contractors, subcontractors, or those with whom it deals, (3) continued retention in escrow of funds illegally collected from the United States of America, its contractors, or subcontractors, under the Montana Act during the pendency of this action to insure, in the event the plaintiff prevails, that proper refunds shall be made to the United States of America, including interest (comensurate with the spirit of this Court's May 3, 1973 Restraining Order), and (4) a refund of taxes erroneously or illegally imposed or collected from the United States of America, its contractors, subcontractors, or those with whom it deals under the Montana Act.

2. This action has been authorized and requested by a delegate of the Secretary of the Army, a department of the plaintiff, United States of America, and is brought under the direction of the Attorney General of the United States, to protect the pecuniary interests and sovereign rights of the United States.

3. Jurisdiction of this action is conferred upon this Court by the provisions of Sections 1345 and 2201 of Title 28, United States Code, for the reason that this is a civil action brought by the United States to obtain a declaratory judgment from this Court respecting the legal rights of the United States and the provisions of Section 1331 of Title 28, United States Code, for the reason that

the amount in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs, and this is a suit arising under the Constitution and laws of the United States.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States of America and those with whom it contracts on one hand and the defendants on the other hand concerning their respective rights and duties.

5. A three-judge Court is properly invoked in this action pursuant to the provisions of Section 2281 of Title 28, U.S.C., because the plaintiff is attacking a Montana State statute and its application on grounds of unconstitutionality.

6. Plaintiff, United States of America, is a corporate sovereign and body politic.

7. The defendant, State of Montana, is a body politic and corporate sovereign and is joined as a defendant in this action because the action involves an attack on the constitutionality of a State statute and its application. The defendant, Department of Revenue of the State of Montana, is the agency responsible for the administration and enforcement of tax laws, including the Montana Act and regulations (and is the defendant properly substituted for the State Board of Equalization). Defendant Keith Colbo is the Director of Revenue for the State of Montana and is joined herein in his official capacity (and is the defendant properly substituted for the individual members of the State Board of Equalization).

THE ILLEGAL INTERFERENCE AND ILLEGAL REGULATION BY DEFENDANTS

8. In the performance of its governmental functions, plaintiff, United States of America, has entered into, prior to and since enactment of the Montana Act, and will enter contracts with, and has employed and will employ contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter or repair buildings, structures, installations, or facilities for itself, its agencies and instrumentalities, including its Department of the Army.

9. Congress, in the Armed Services Procurement Act of 1947 (Title 10, U.S.C., Section 2301, et seq.) and United States Government Procurement Regulations (32 CFR Sec. 1.100 et seq.) both provide for federal regulation or federal standards to determine and insure the fitness, qualifications, responsibility and reliability of persons, companies, or corporations performing construction work for the United States Government, including those contractors or subcontractors under contract with the United States Government in Montana.

10. The language of the Montana Act and regulations, at all times pertinent hereto, has provided, and still provides that it is unlawful for a person to engage in the business or act in the capacity of a public contractor in Montana without having a Public Contractor's License, without paying a License Fee of $10 to $200 and without paying Gross Receipts Taxes measured by 1% of the value of all public construction contracts.

11. The Montana Supreme Court in the Case of *Peter Kiewit Sons' Co* v. *State Board of Equalization*, 30 Mont. 32, 505 P. 2d 102 (1973), held that the

regulatory provisions of the Montana Act do not apply to contractors or subcontractors performing work for the Federal Government.

12. Despite the holding in the *Kiewit* case, the licensing and regulatory provisions of the Montana Act and regulations still create no exemption for federal contractors and their language and their enforcement interferes with or regulates such federal contractors, in that in order (a) to submit bids or proposals (b) to enter into contracts with or (c) to perform or continue their contractual obligations with the Federal Government, contractors must still (i) obtain and maintain a Public Contractor's License under the Montana Act and regulations and accordingly, such contractor must be subject to licensing requirements and regulations, meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore federal statute and regulations, (ii) pay a license fee ($10 to $200), and (iii) pay an additional license fee or gross receipts tax currently measured by 1% of the gross receipts derived from the value of construction contracts with the Federal Government.

13. Furthermore, once granted, the defendants have authority to suspend such federal contractor's License (Section 84-3510 R.C.M., 1947, as amended) thereby effectively either preventing such federal contractor from performing his federal contract or placing him in violation of State law if he acts in the capacity of a public contractor without a License.

14. There is no authority under any Montana statute or act to impose or enforce the same or similar regulatory or licensing provisions found in the Montana

Act and regulations against contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations.

15. The licensing and regulatory provisions of the Montana Act are erroneous, invalid and without legal force or effect because they are in conflict with the laws and Constitution of the United States of America in that they:

(a) Illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions.
(b) Illegally interfere with the Federal Government's power to select contractors and schedule construction and are in conflict with Federal procurement law and regulations.
(c) Illegally frustrate the federal policy of selecting the lowest possible bidder.
(d) Illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

THE UNCONSTITUTIONAL TAXATION

16. The taxing provisions of the Montana Act and regulations provide that a Gross Receipts tax must be paid at the present rate of 1% of all receipts derived from public construction contracts performed in the State of Montana, including those receipts derived from performing construction contracts for the Federal Government.

17. The taxing provisions of the Montana Act and regulations also provide for certain refunds for personal property taxes paid in Montana and credits for income

and corporate income taxes paid to the State of Montana (Section 84-3514, R.C.M., 1947, as amended). Such refunds and credits are available only up to the amount of 1% Gross Receipts tax paid by the public contractor or subcontractor.

18. Provisions of construction contracts in Montana between plaintiff and its contractors and subcontractors require, and have required the inclusion in the contract price of all Montana taxes, including the 1% Gross Receipts tax, and in accordance therewith, the United States has made, or must make, reimbursement to said contractors and subcontractors for the amounts remitted by them to defendants. Accordingly, plaintiff has incurred and will continue to incur liability for the 1% Gross Receipts tax imposed upon and collected by defendants from federal contractors and subcontractors under authority of the Montana Act and regulations.

19. Department of the Army contracts for construction in Montana since 1971 have insisted that federal contractors and subcontractors take advantage of all refunds and credits provided for under the Montana Act.

20. No provision is provided in any Montana statute or regulation to refund the excess of Gross Receipts taxes collected over and above all such available refunds and credits to public contractors, if an excess exists either on an annual or completed contract basis. The taxing provisions of the Montana Act make no provisions for refunds for personal property taxes paid in other states or provide no credits for income taxes or corporate income taxes paid to other states. Accordingly, the system of refunds and credits places a heavier tax burden on out-of-state contractors than on Montana contractors.

21. Defendants have collected an excess from public contractors, including federal contractors and subcontractors, over and above all refunds and credits of approximately four and one-half million dollars ($4,500,000) since the taxing provisions of the Montana Act became effective on or about January 1, 1967.

22. The excess of revenue collected over and above refunds and credits taken is currently increasing making the the 1% Gross Receipts tax a revenue-raising measure rather than a revenue-enforcing measure, i.e., there is not a "wash-out" of the 1% Gross Receipts tax (i.e., the net 1% Gross Receipts tax paid does not equal zero) after all available refunds and credits are taken for many public contractors, including federal contractors.

23. There is no authority under any Montana statute or act to impose or enforce the same or a similar tax provisions found in the Montana Act and regulations against construction contracts performed for private or corporate landowners nor do contractors or subcontractors pay any Gross Receipts taxes for performing construction contracts with private persons, private businesses or private corporations as they do for performing public construction contracts. Accordingly, the cumulative Montana taxes paid by contractors who perform construction contracts for the Government can never be less than but can be greater than the cumulative Montana taxes paid by contractors performing construction contracts for private parties.

24. The taxing provisions of the Montana Act and regulations are erroneous, invalid and without legal force or effect because both the language and the operation of the Act violates the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the plaintiff, United

States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally force the Federal Government to pay more for its construction than does a private person, business or corporation;

(c) illegally imposes a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects; and

(d) illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

25. Under the terms of agreements between the Government and its contractors and its subcontractors, the Government is entitled to the benefit of any recovery of any part of any said 1% Gross Receipts tax payments imposed, remitted to and received by defendants under authority of the taxing provisions of the Montana Act and regulations.

26. It is necessary to continue retention of the portion of the funds collected from the Federal Government or its contractors under authority of the Montana Act and regulations during the pendency of this action to insure that proper refunds can be made by the defendants in the event that the plaintiff prefails.

WHEREFORE, plaintiff, United States of America, prays that this Court enter an order granting:

1. A declaratory judgment, ordering and adjudging that the Federal Constitution and laws of the United States are in conflict with and thereby prohibit the statutory scheme, the imposition, application and enforcement of both (a) the taxation provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation, and Gross

Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder, against the United States, its contractors and its subcontractors because:

(A) The Taxation Provisions

(1) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business in violation of the Supremacy Clause, Article VI, Clause 2, and the Fourteenth Amendment;

(2) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects in violation of the Fourteenth Amendment;

(3) illegally force the United States of America to pay more for its construction than does a private party or corporation in violation of the Supremacy Clause, Art. VI, Cl. 2;

(4) the statutory scheme and the operation of the system of personal property tax refunds and income and corporate tax credits, illegally place a heavier tax burden on an out-of-state contractor than a Montana contractor in violation of both the Commerce Clause, Art. I, Sec. 8, Cl. 2 and Supremacy Clause, Art. VI, Cl. 2; and

(5) the system of refunds and credits illegally interferes with the Federal Government's free choice to choose its contractors and frustrates the policy of choosing the lowest bidder in violation of federal procurement law and the Supremacy Clause, Art. IV, Cl. 2.

(B) The Licensing and the Regulatory Provisions

(1) illegally interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with the Supremacy Clause, and Federal law and policy regulating Federal construction and procurement;

(2) illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions;

(3) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(4) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

2. In the alternative, if this Court finds no unconstitutional discrimination or violation of the Commerce Clause, a declaratory judgment, ordering and adjudging that the taxing provisions of the Montana Act and regulations were intended by the Montana legislature as a revenue-enforcing measure, were intended to "wash-out" and, accordingly, each year after all refunds and credits are taken by a public contractor or at the termination of each contract, the defendants must refund any excess Gross Receipts taxes collected under the Montana Act.

3. A permanent injunction that prohibits defendants and all persons acting in concert with them, from applying both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act and regulations against the plaintiff, its contractors or subcontractors.

4. Continued retention of funds in escrow.

5. A refund of taxes, with interest, equal to all such amounts or sums as have been paid to defendants by plaintiff or its contractors or its subcontractors under

the Montana Act in excess of all refunds and credits taken.

6. Such other and further relief to the plaintiff as seems proper.

OTIS L. PACKWOOD
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Planitiff

-vs-

STATE OF MONTANA; Department of Revenue of the State of Montana; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

ANSWER

CONE NOW the Defendants, STATE OF MONTANA and the Department of Revenue of the State of Montana and its Director, by their attorneys and answer the Plaintiff's Amended Complaint on file as follows:

I.

The Defendants agree that the reasons listed in paragraph "1" thereof are apparently why the lawsuit was instituted by Plaintiff, although the Defendants deny the validity of the reasons stated and the allegations purportedly supporting such reasons.

II.

Answering the allegations of paragraph "2." thereof, Defendants deny having sufficient knowledge or information to form a belief as to the truth thereof and therefore deny the same.

III.

Answering the allegations of paragraph "3." thereof, Defendants admit that Section 1345 of Title 28 USCA confers jurisdiction on the Federal District Courts for suits commenced by the United States. Deny as to Section 1331, Title 28 that the Montana Act in question levies any tax directly on the United States or that an amount in controversy in excess of $10,000.00 is here involved as to these litigants. Admit that Section 2201, Title 28, USCA creates a declaratory judgment remedy for litigants as to whom a court has jurisdiction.

IV.

Admit the allegations of paragraphs "4." through "7." except that in paragraph "7." the Director of Revenue is not Keith Colbo but rather W. A. Groff.

V.

Admit the allegations of paragraphs "8." and "9." thereof.

VI.

Answering the allegations of paragraph "10." thereof, Defendants deny that the Montana Act in question as twice construed by the Supreme Court of the State of Montana can require the licensing of any public contractor engaged in a federal project for any purpose whatsoever as described in paragraph "9." of Plaintiff's amended complaint (fitness, qualifications, responsibility or reliability) and as to such public contractor engaged in a federal project the act in question pertains to revenue only and any licensing is solely for the purpose of implementing the orderly levy and collection of license tax revenue. Deny each and every other allegation contained in said paragraph.

VII.

Admit the allegations of paragraph "11."

VIII

Deny the allegations of paragraph "12." thereof and in that regard reallege paragraph "VI" above in this Answer. Defendants further allege that since the second affirmation by the Montana Supreme Court in February, 1975 of the act in question the Defendant Department of Revenue has scheduled hearings directed at revising and updating the regulations pertinent to said Act, and Plaintiff has been advised of such hearings and been invited to participate and aid in the elimination of any provision heretofore contended by the Plaintiff to justify concern as to the exercise by the Defendants of control over the Plaintiff's selection and control of its contractors.

IX

Deny the allegations of paragraph "13." thereof and in that regard reallege paragraph "VI" above in this Answer.

X

Admit the allegations of paragraph "14."

XI

Deny the allegations of paragraph "15."

XII

Answering the allegations of paragraph "16." thereof, Defendants admit that a 1% gross receipts tax is levied upon all public contractors whether located within or without the State of Montana; deny any inference from the Plaintiff's pleading that said tax is levied directly on the United States or that any economic impact on the United States is substantial.

XIII

Admit the allegations of paragraph "17."

XIV

Deny the allegations of paragraph "18." thereof.

XV

Answering the allegations of paragraph "19." thereof, Defendants deny having sufficient knowledge or information to form a belief as to the same and therefore deny the same.

XVI

Answering the allegations of paragraph "20." thereof, Defendants admit that there is no provision for refund of the excess, if any, of gross receipts taxes above the credits referred to by Plaintiff in paragraph "17." of its Amended Complaint. Admit that the Act makes no provision for "refunds" of personal property taxes paid to some other jurisdiction. Allege that Montana contractors doing business out of state incur various types of taxes in such jurisdictions— e.g. sales taxes; personal property taxes; income taxes; use taxes, etc., for which the Montana act provides no credit or rebate. Deny that the system of refunds and credits places a heavier tax burden on out-of-state contractors than on Montana contractors.

XVII

Admit the allegations of paragraph "21." thereof.

XVIII

Answering the allegations of paragraph "22." thereof, Defendants deny that the revenue collected on the contractors gross receipts tax is currently increasing; admit that the tax has not operated as a complete washout. Admit that said Act is operating in part as a revenue

enforcing measure as to personal property and income taxes and in part as a revenue measure the economic impact of which on the Federal Government is neither direct nor substantial.

XIX

Answering the allegations of paragraph "23." thereof, Defendants admit that the classification under the Act differentiates between public contractors and private contractors and that the 1% gross receipts tax applies to public contractors and does not apply to private contractors. Deny each and every other allegation contained in said paragraph.

XX

Deny the allegations of paragraph "24." thereof.

XXI

Deny the relevance of paragraph "25.". Deny that in drafting its contracts the Plaintiff was under any requirement whatsoever to single out the Montana Gross Receipts Tax if no such action is taken by the Plaintiff as to the myriad other taxes and expenses of operation—including sales taxes where applicable—for which provision may or may not be made by an interested bidder on a federal project.

XXII

Deny the allegations of paragraph "26."

XXIII

Deny each and every allegation contained in said Amended Complaint and not hereinbefore specifically admitted.

WHEREFORE, Defendants having fully answered pray that Plaintiff takes nothing by virtue of its

Amended Complaint and that the Defendants have judgment for their costs herein expended.

DATED this 17th day of March, 1975.

ROBERT L. WOODAHL, Attorney General of the State of Montana;
JAMES SENESCHAL, Chief Counsel, Department of Revenue, State of Montana
TERRY B. COSGROVE and ROBERT A. POORE, Special Assistant Attorneys General

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MONTANA, et al.,

Defendant.

PLAINTIFF'S ANSWERS AND OBJECTION TO DEFENDANTS' REQUEST FOR ADMISSIONS AND INTERROGATORIES

Now comes the plaintiff, United States of America, by its undersigned attorneys, and submits answers and objections to defendants' Request for Admissions and Interrogatories as follows:

REQUEST No. 69:

Please admit each of the following Requests pertinent to the State of Montana case of *Kiewit* v *The State Board, et al.*, 161 Mont. 140, and as to any Request which is denied, please explain in exact detail the facts justifying such denial:

(a) That the United States required that the lawsuit be filed by Peter Kiewit.

(b) That the United States reviewed and approved the complaint.

(c) That the United States paid the attorneys-fees and costs.

(d) That the United States directed the appeal from the State District Court to the Supreme Court of Montana.

(e) That the United States appeared as amicus curiae and submitted a brief and participated in the oral argument.

(f) That the real party in interest in said state litigation was the United States of America.

(g) That the United States directed the filing of a Notice of Appeal to the Supreme Court of the United States.

(h) That the United States paid all legal fees pertinent to the filing of such Notice of Appeal.

(i) That the United States was prepared to pay all costs of appeal to the United States Supreme Court, including attorneys' fees.

(j) That the Solicitor General of the United States (Erwin N. Griswold) in effect negated the United States Supreme Court Appeal.

(k) That the United States had the power through Peter Kiewit to raise any issue the United States desired to be raised in the State Court litigation.

(l) That all issues being raised in this litigation could have been raised and litigated in the State Court.

(m) That all issues being raised in this litigation could have been raised and litigated the state court.

ANSWER TO REQUEST No. 69.

The plaintiff admits and denies the following subparagraphs to Request No. 69:

(a) Admits

(b) Admits

(c) Admits
(d) Admits
(e) Admits
(f) Admits
(g) Admits
(h) Admits
(i) Admits
(j) Admits
(k) Denies
(l) Denies
(m) Denies

With respect to Interrogatory No. 69, subparagraph (k), (l) and (m), see Answer No. 8 and plaintiff's Memorandum of Law:

(1) In Further Opposition to Defendants' Motion to Dismiss;

(2) In Opposition to defendants' Motion for Summary Judgment Based on Res Judicata or Collateral Estoppel; and

(3) In Support of Its Cross Motion for Summary Judgment.

Dated this 2nd day of October, 1975

SCOTT P. CRAMPTON
Assistant Attorney General
U. S. Department of Justice
Tax Division
Washington, D. C. 20530

JOHN J. McCARTHY
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OF COUNSEL:

KEITH L. BURROWS
United States Attorney
District of Montana

(All Requests and Answers other than No. 69 Omitted in Printing)

PLAINTIFF'S EXHIBIT No. 1

Standard Form 23 January 1961 Edition General Services Administration Fed. Proc. Reg. (41 CFR) 1-16.401 **CONSTRUCTION CONTRACT** *(See instructions on reverse)*	Contract No. DACW67-74-C-9801 Date of Contract 1973 Aug. 03
Name and Address of Contractor SLETTEN CONSTRUCTION CO. 1301 10th Avenue North Great Falls, Montana 59403	Check Appropriate Box ☐ Individual ☐ Partnership ☐ Joint Venture ☒ Corporation, incorporated in the State of Montana

Department or Agency
DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
1518 Alaskan Way South, Seattle, Washington 98134

Contract for *(Work to be performed)*
Phase I
United States Post Office

Place
Billings, Montana

Contract Price *(Express in words and figures)*
One Million, Eighty-seven Thousand, Five Hundred Fifty-three and No Hundredths Dollars ($1,087,553.00)

(Only paragraphs 35, 44 and 73 included, remaining portions of exhibit omitted in printing).

35. FEDERAL, STATE, AND LOCAL TAXES (1971 NOV)

(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by

this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and—

(1) results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase, *provided* the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; or

(2) results in the Contractor not being required to pay or bear the burden of, or in his obtaining a refund or drawback of, any such Federal excise tax or duty which would otherwise have been payable on such transactions or property or which was the basis of an increase in the contract price, the contract price shall be decreased by the amount of the relief, refund, or drawback, or that amount shall be paid to the Government, as directed by the Contracting Officer. The contract price shall be similarly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden of, or does not obtain a refund or drawback of, any such Federal excise tax or duty.

(c) Paragraph (b) above shall not be applicable to social security taxes or to any other employment tax.

(d) No adjustment of less than $100 shall be made in the contract price pursuant to paragraph (b) above.

(e) As used in paragraph (b) above, the term "contract date" means the date set for bid opening, or if this is a negotiated contract, the contract date. As to additional

supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

(f) Unless there does not exist any reasonable basis to sustain an exemption, the Government upon the request of the Contractor shall, without further liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax; *provided* that, evidence appropriate to establish exemption from any Federal excise tax or duty which may give rise to either an increase or decrease in the contract price will be furnished only at the discretion of the Government.

(g) The Contractor shall promptly notify the Contracting Officer of matters which will result in either an increase or decrease in the contract price, and shall take action with respect thereto as directed by the Contracting Officer. (ASPR 7-103.10(a))

44. MODIFICATION PROPOSALS — PRICE BREAKDOWN (1968 APR)

The Contractor, in connection with any proposal he makes for a contract modification, shall furnish a price breakdown, itemized as required by the Contracting Officer. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all material, labor, equipment, subcontract, and overhead costs, as well as profit, and shall cover all work involved in the modification, whether such work was deleted, added or changed. Any amount claimed for subcontracts shall be supported by a similar price breakdown. In addition, if the proposal includes a time extension, a justification therefor shall also be furnished. The proposal, together with the price breakdown and time extension justification, shall be furnished by the date specified by the Contracting Officer. (ASPR 7-602.36)

73. MONTANA "PUBLIC CONTRACTORS" LICENSE FEES (1973 MAY)

Notwithstanding any other provisions of this contract:

(a) The contract price includes the license fees imposed by the State of Montana on "public contractors" under the provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, with respect to this contract and any subcontracts awarded hereunder.

(b) Section 84-3514, R.C.M., 1947, as amended, provides that personal property taxes paid in Montana on any personal property of the Contractor (or subcontractor) which is used in the business of the Contractor (or subcontractor) may be credited against the license fees (including the license fee based on gross receipts) required under Section 84-3505, R.C.M., 1947, as amended. The Contractor (or subcontractor) shall take advantage of this allowed credit by claiming a refund against the payments of the license fee based on gross receipts resulting from this contract for all personal property taxes paid on Contractor's (or subcontractor's) equipment used in the performance of this contract, or that amount of said personal property taxes as is required to reduce the gross receipts tax payment on this contract to zero.

(c) Nothing herein shall be construed to limit the right of the Contractor (or subcontractor) to apply for and receive credits on its Montana: (i) corporation license taxes (Title 84, Chapter 15, R.C.M., 1947, as amended) or (ii) income tax (Title 84, Chapter 49, R.C.M., 1947, as amended), depending upon the type of tax Contractor (or subcontractor) is required to pay under the laws of

the State of Montana, for payments of license fee based on gross receipts required under Section 84-3505, R.C.M., 1947, as amended, made under this contract; and the Government shall have no right or interest in the benefit from such credits which are allowed. Contractor, however, shall not apply for and receive credits on its corporation license tax or income tax until it has claimed all refunds available for personal property taxes paid with respect to the contract.

(d) The Government reserves the right to direct the Contractor, and the Contractor, in turn, shall reserve the right to direct all subcontractors to take all necessary action to contest the validity of these fees, and the contract price shall be equitably adjusted to cover the cost of such action, including reasonable attorneys' fees.

(c) If the Contractor, or a subcontractor, is not required to pay or bear the burden, or obtains a refund in whole or in part of these fees, the contract price shall be decreased by the amount of such relief or refund allocable to this contract, or that amount shall be paid to the Government as the Contracting Officer directs.

(f) The Contractor shall promptly notify the Contracting Officer of matters which may result in either an increase or decrease in the contract price. No adjustment of less than $100 is required to be made in the contract price pursuant to this clause.

(g) The Contractor shall maintain, and shall require all subcontractors to maintain, accurate records of all payments of the fees under this contract.

(h) The Contractor, and any subcontractors, will pay the license fees under written protest (as required by Title 84, Chapter 45, R.C.M., 1947, as amended), specifying the following grounds of protest including but not limited to:

(i) The said fees are invalid in that they unconstitutionally discriminate against the United States and persons dealing with the United States.

(ii) The Act imposing said fees is invalid in that it unconstitutionally interferes with the Federal Government's power to select contractors and schedule construction and is in conflict with Federal laws regulating procurement.

(iii) The said fees deny the taxpayer the right to Equal Protection of Law and Due Process of Law in that the classifications created by the Act enacting said fees are arbitrary and capricious, and discriminate against the United States and persons with whom it deals.

After such payment under protest and at the request of the Contracting Officer, the Contractor, and any subcontractors, or their legal representatives will bring an action in a court of competent jurisdiction against the officers to whom the license fees were paid, or against the county or municipality in whose behalf the license fees were collected, and the State Board of Equalization, which shall be served with summons and a copy of the complaint, to recover such fees. Such action to recover the fees shall be commenced and summons served within sixty (60) days after the date of payment of the same. Copies of the submission of payment under protest, summons and complaint filed will be promptly furnished to the Contracting Officer.

The Contracting Officer will not direct the Contractor, or any subcontractor, to bring an action to recover such fees where the amount of the contract or subcontract concerned is under $20,000, or where the incremental payments of such fees for any two-month period are less than $200.

PLAINTIFF'S EXHIBIT 2

D. Cost	75,000
I. Cost	20,000
Profit	5,000
1% Tax	1,000
	101,000

PLAINTIFF'S EXHIBIT 11

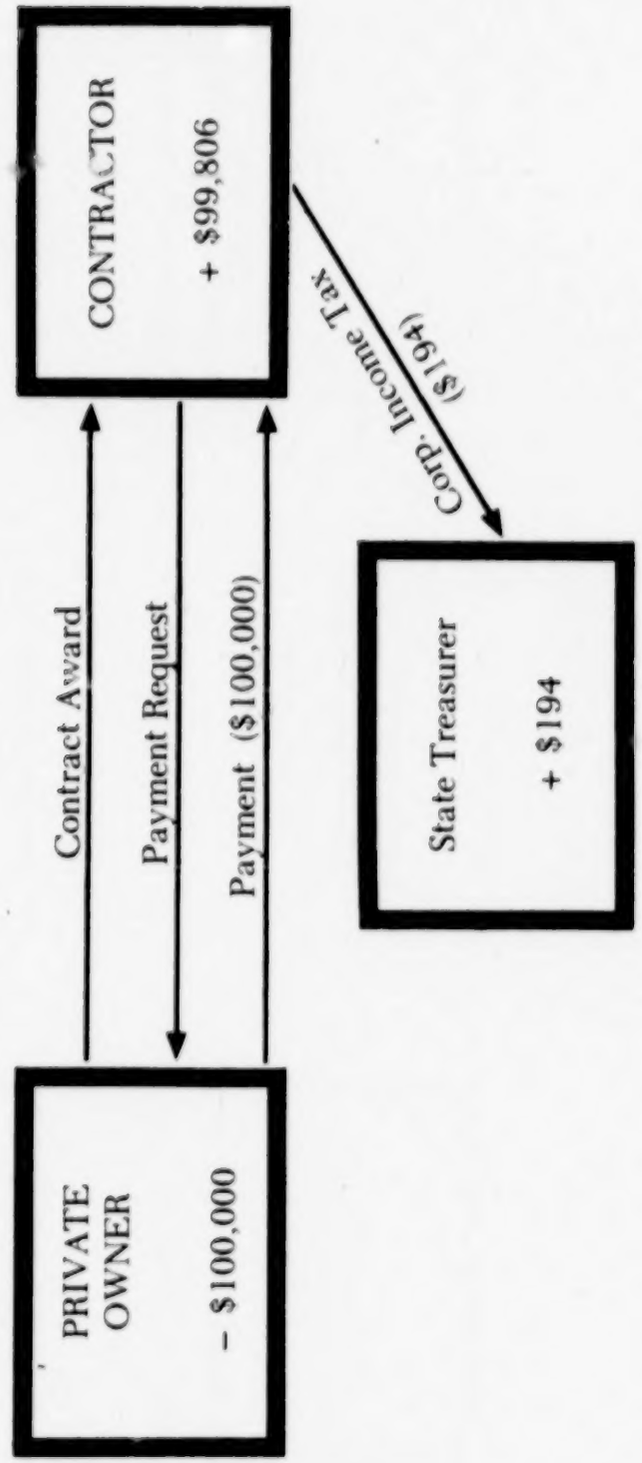
U. S. & Other Than State Government Agency		State Government		Private Owner	
Direct Costs	$75,000.00	Direct Costs	$75,000.00	Direct Costs	$75,000.00
Indirect Costs	20,000.00	Indirect Costs	20,000.00	Indirect Costs	20,000.00
Plus Profit	5,000.00	Plus Profit	5,000.00	Plus Profit	5,000.00
	$100,000.00		$100,000.00		$100,000.00
Montana Gross Receipts Tax 1%	1,000.00	Montana Gross Receipts Tax 1%	1,000.00	Final Cost to Owner	$100,000.00
Award Cost	$101,000.00	Award Cost	$101,000.00	Difference State—	$346.00
				U. S. non-state—	$654.00
Personal Property Tax Refund	$ 346.00	Personal Property Tax Refund	$ 346.00		
Corporate Income Tax Credit	194.00	Corporate Income Tax Credit	194.00		
Unrefunded Tax Balance	460.00	Unrefunded Tax Balance	460.00		
Total 1% Tax	$1,000.00	Total 1% Tax	$1,000.00		

PLAINTIFF'S EXHIBIT 11 — (Continued)

U. S. & Other Than State Government Agency	State Government
1. U. S. gets back the $346.00 pp tax refund from contractor.	1. Contractor gets back the $346.00 pp tax refund and keeps it.
2. Contractor gets the $194.00 corp. income tax credit. At this time the State Treasurer would transfer this amount from the 1% tax fund to the general fund.	2. Contractor gets the $194.00 corp. income tax credit. At this time the State Treasurer then transfers this amount from the 1% tax fund to the general fund.
3. The unrefunded tax balance of $460.00 stays in the state 1% tax fund. Eventual transfer to the general fund.	3. The unrefunded tax balance of $460.00 stays in the state 1% tax fund. Eventual transfer to the general fund.
Final Cost to the Awarding Agency $100,654.00	Final Cost to the Awarding Agency $100,346.00
	Difference $ 346.00

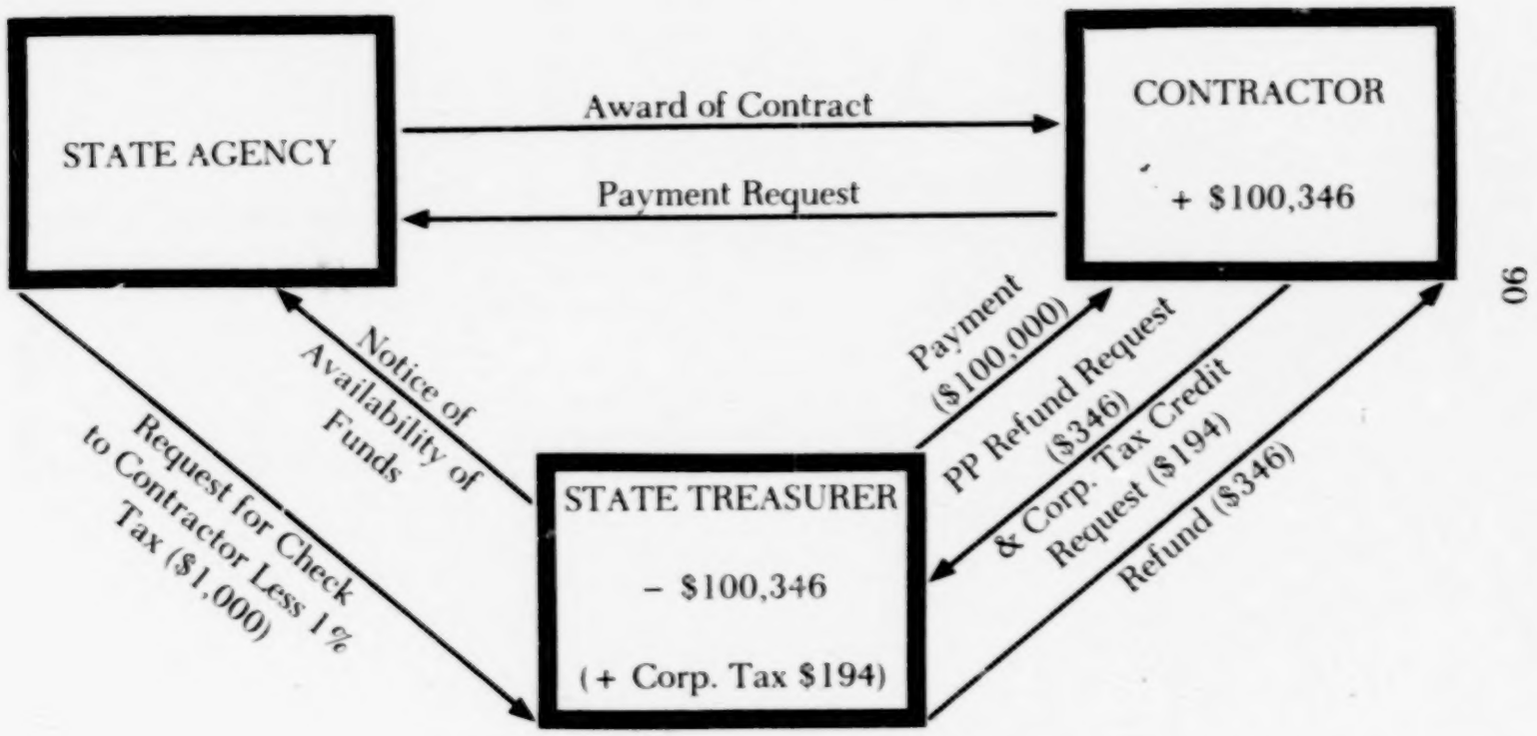
PLAINTIFF'S EXHIBIT 12

PRIVATE OWNER



PLAINTIFF'S EXHIBIT 13

STATE CONTRACTS



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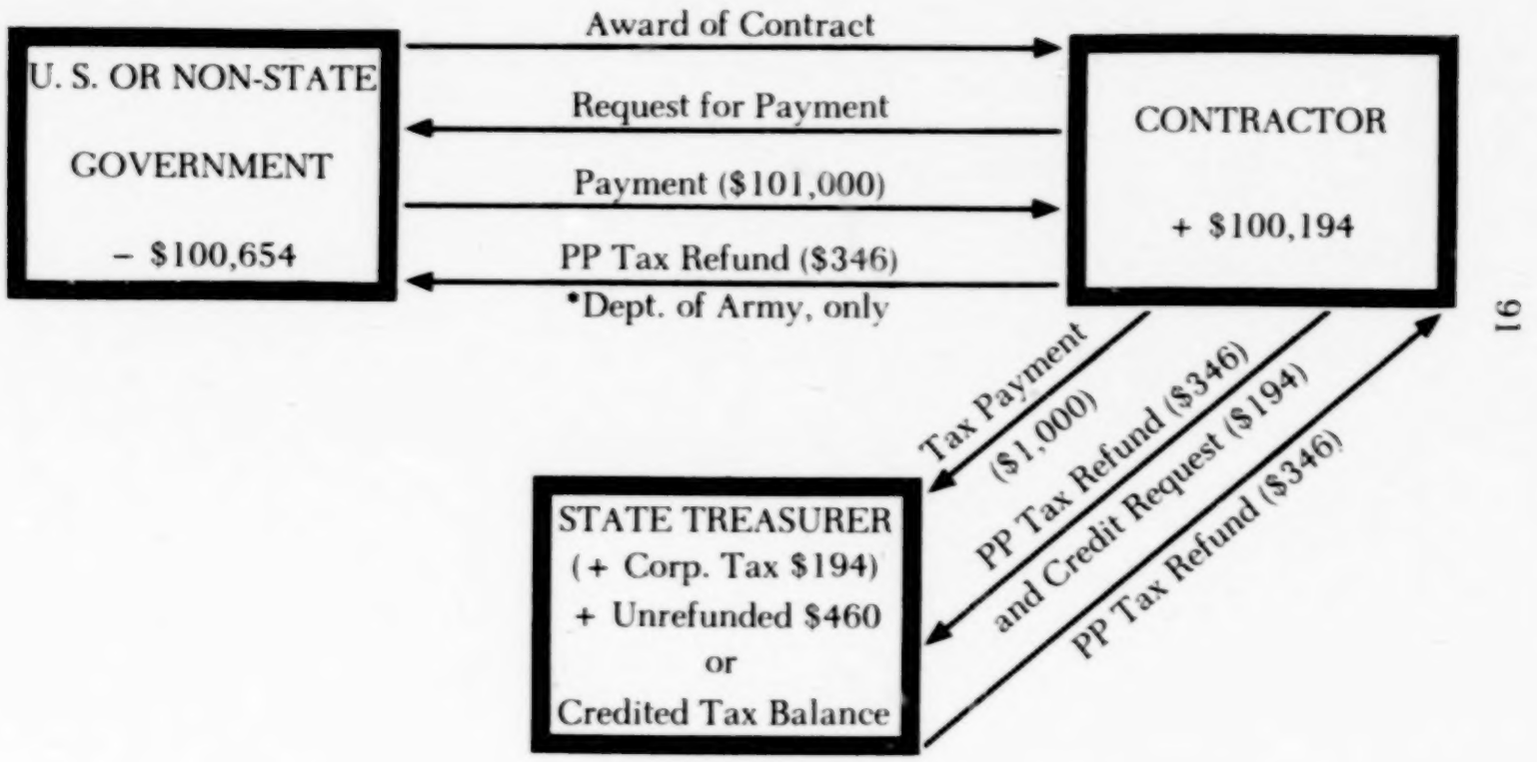
PLAINTIFF'S EXHIBIT 14

U. S. & NON-STATE GOVERNMENTS



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EXCERPTS OF OFFICIAL TRANSCRIPT OF PROCEEDINGS HELD MARCH 30th, 31st and APRIL 1st, 1976, MISSOULA, MONTANA

(Tr. 8)

Direct Examination of MERRILL A. MORAN by Charles Stratton

Called as a witness, duly sworn, testified as follows: (Tr. 9)

Q. Could you state your name for the record? A. Merrill A. Moran.

Q. And Your address? A. 3600 6th Ave. South, Great Falls, Montana.

Q. Your occupation? A. Secretary-treasurer, Sletton Construction Company.

Q. And where is Sletton Construction Company located? A. The main office is in Great Falls, Montana.

Q. Could you summarize for us, Mr. Moran, your training or education above high school level? A. I attended the University of Oregon and graduated from the College of Great Falls with a degree in business administration.

Q. Are you a C.P.A.? A. Yes, I am a Certified Public Accountant.

Q. And have you ever practiced? A. Yes, I practiced public accountancy for 12 years prior to joining the Sletton Construction Company.

Q. And you are presently now the secretary-treasurer of Sletton Construction Company? A. Yes.

Q. And could you describe your function as treasur-

er? Some of the duties that you perform? A. Basically I am the accountant-office manager for the

(Tr.10)

company. I perform all comptroller-type duties —

MR. COSGROVE: Your Honor, I'm having a hard time hearing the witness. Could he speak up?

THE COURT: Speak up a little, if you can.

THE WITNESS: All right.

BY MR. STRATTON: How long have you been in that position? A. Since I joined the company in 1964.

Q. And do you have any prior experience with regard to construction? A. Yes. I was Sletton Construction Company's auditor for approximately ten years before becoming associated with the company.

Q. And what is the nature of the work that Sletton Construction Company performs? A. We are a general contractor with an emphasis on commercial work, highway heavy work or highway work as restricted primarily to bridge building.

Q. And so would you explain what commercial work is? A. Well, commercial work is commonly called building but on a commercial basis. We do not engage in any house building so to speak. It's all a commercial--type building situation.

Q. Such as a post office or - A. Right. Office buildings, banks, etc.

(Tr.11)

Q. Hotels, motels? A. Correct.

Q. Do you now or have you ever reviewed cost data and financial records with regard to estimating on such construction projects? A. Yes.

Q. Are you familiar with bidding or estimating on construction projects in Montana? A. Yes.

Q. Are you familiar with how a bid or estimate for a construction project in Montana is arrived at? A. Yes.

Q. Pertinent to your experience with Sletton Construction Company could you describe to the court how an estimate is prepared on a construction project in Montana? A. Well, the preparation of an estimate I think is in a series of steps. First, we obtain a set of plans and specifications from the owner or architect. We make a site visitation to determine conditions on the site. We review the specifications in detail. We make a quantity take off from the plans, price out those quantities then in terms of labor costs, material costs, equipment rental costs and if we plan on subcontracting portions of the contract we will solicit subcontract invitation bids, arrive at those low bids and then to that

(Tr.12)

we would add our field overhead costs and then on top of those costs would be added an element of office overhead and profit to arrive at our bid price.

Q. Could you define for the court what direct costs are on a construction project? What is meant by direct costs? A. Well, our definition of direct cost would include our direct labor, in other words, those workmen working directly on the project; the material costs, the cost of material going into the project; the cost of renting equipment to perform various phases of the work; the cost of any subcontracts that are issued along then with our field overhead. Now our field overhead generally includes superintendent's salary the utilities used on the field office, applicable taxes, applicable insurance, the cost of the bond and generally any cost that can be

attributed directly to the job we consider a direct job cost.

Q. I see. And could you describe what an indirect cost would be on a construction project? A. Well, indirect costs are basically our office overhead costs, which would include our office salaries, our utilities, etc. In other words, those costs that you cannot directly apportion to a project.

Q. Would those be termed general and administrative expenses? A. General and administrative expenses, yes.

(Tr. 13)

Q. This would be synonymous with indirect cost? A. Indirect cost, right.

Q. I see. Now is there another element in figuring your cost on a construction project such as profit? You have direct costs, indirect costs, and profit, is that right, in estimating a project or bidding on a project? A. Right. In arriving at a contract, at a bid price, yes.

Q. I see. Could you describe the element of profit? A. Well —

Q. Sometimes I've heard the term "margin" used as synonymous with profit. Do you define margin and profit the same way? A. Some people define them in the same terminology. We generally use the word "profit" simply to mean the excess over our cost is our profit.

Q. Does that include all of the money that you take into your pocket or does that include other factors, contingency factors, such as inflation or risk or items of that nature, corporate income taxes? A. Well, corporate income taxes are really a division of profit. We

would pay no corporate income tax if we didn't earn a profit.

Q. I see. Does your profit contain certain other contingency factors or are they included in indirect or direct costs?

(Tr. 14)

A. Well I'm not certain what you mean by contingency factors.

Q. Such as inflation? A. No. There is no element built into the profit that doesn't exist.

Q. You have built in the inflation then in your direct costs such as labor or materials if you can take inflation? A. Yes, if you are referring to a job that might be spread over a period of three years and we anticipate an increase in labor costs we'll say in that three year period of time, we would anticipate that increased cost in our bidding procedure. So we have an element of inflation built into our cost that generally holds true.

Q. Where do you, Mr. Moran, fit into this procedure of bidding on construction projects or estimating on construction projects? A. I am not an estimator. An estimator is a person trained to take off certain quantities etc. off of plans. I merely review the bidding procedures. In most cases I mechanically check all calculations, advise the bidding staff of certain costs that we know historically exist and ascertain those costs are included in the bid.

Q. Is it a fair statement that in the preparation and submission of a bid on a construction project your company expects to recover all costs involved plus an

(Tr. 15)

element of profit? A. Yes.

Q. Then you would take into account all known identifiable costs and figure them in the bid? A. Yes.

Q. Would you then pass those known identifiable costs on to the landowner? A. Yes.

Q. In your duties with Sletton Construction Company have you had experience with the operation of the one percent gross receipts tax imposed by the Gross Receipts Tax Act on public construction in Montana? A. Yes.

Q. Could you tell me how it is calculated, how the one percent gross receipts tax is calculated? A. Well, we add to our direct costs one percent of our bid price to cover the one percent gross receipts tax that we are going to have to pay.

Q. In other words the one percent gross receipts tax is imposed on gross revenues received by a construction contractor performing work for a public agency, a Government agency? A. Yes.

Q. Can this one percent tax be calculated with precision? A. Yes.

(Tr. 16)

Q. If your company were awarded a construction contract with the Federal Government for construction of, say, a United States Post Office, would your company be required to remit the one percent gross receipts tax to the State of Montana? A. Yes.

Q. Would that mean every time that you get a payment from the United States Government that you would have to remit one percent of that over to the State? A. Yes.

Q. Would the same hold true if you performed work for the State of Montana? A. The State of Montana

withholds the one percent rather than us remitting it to the State. In other words, the one percent is withheld from the monthly estimate by the State of Montana.

Q. So you never see that? A. We don't see it, no.

Q. Is the one percent gross receipt tax a known identifiable cost of performing the construction project for the Federal Government? A. Yes.

Q. So then at the time of submission of a bid to the Federal Government you would take into account the fact that the one percent gross receipts tax had to be paid to

(Tr. 17)

the State of Montana? A. Yes.

Q. Then you would add the one percent gross receipts tax to the Federal Government out of economic necessity; is that true? A. Yes.

Q. And you said you put them — you put it into your direct costs rather than indirect costs or profit? A. No, we consider it a direct cost.

Q. You testified that is so because it is a known identifiable cost? A. Correct.

Q. Now do you perform both construction for private individuals or private corporations as well as Governmental agencies in Montana? A. Yes.

Q. Do you add or figure the one percent gross receipts tax in bids for construction projects performed for private individuals or corporations, private corporations? A. No.

MR. STRATTON: At this time, Your Honor, I would like to introduce Plaintiff's Exhibit #1. Plaintiff's Exhibit #1 is listed in the pretrial order and has already been admitted in evidence.

THE COURT: Have you agreed upon its admissibility?

(Tr. 18)

MR. POORE: Yes.

THE COURT: Plaintiff's Exhibit 1 is admitted.

(Plaintiff's Exhibit #1 Received in Evidence)

BY MR. STRATTON: Q. Now I have in hand a document. Would you please look at it, Mr. Moran, and explain what it is to the court? A. This is a copy of a construction contract between Sletton Construction Company and the Department of Army Corps of Engineers for the construction of Phase I of the United States Post Office in Billings, Montana.

Q. And what is the amount of the contract? A. The contract was issued for $1,087,553.

Q. In connection with that specific job performed for the Federal Government in Montana did your company add the one percent gross receipts tax to their bid? A. Yes.

Q. Did the inclusion of that gross receipts tax result in a higher cost to the Federal Government?

MR. POORE: Objected to as calling for a conclusion of the witness. There's no foundation for such an opinion.

THE COURT: Overruled.

MR. STRATTON: Was that objection overruled?

THE COURT: Yes.

(Tr. 19)

BY MR. STRATTON: Q. You can answer the question. A. Yes.

Q. Now assuming that you are performing identical construction jobs under identical conditions in Montana, one for a private individual or corporation and one for a Governmental agency such as the United States. Would there be a difference in the bids? I believe you testified there would be in the one percent gross receipts tax. A. Yes.

Q. Would there be any other significant differences? A. Not as a cost to the owner.

Q. I see. What about bond costs? Would that be an increased cost to the owner? A. Normally all projects that we construct are bonded. It's a rare case where one isn't.

Q. Does that include projects for private corporations as well? A. Right.

Q. Corporations that might be listed on the New York State Stock Exchange? A. Yes.

Q. Mr. Moran, would your company bid less for a State project than for a Federal project? A. An identical project?

(Tr. 20)

Q. An identical project. A. No.

Q. Would the cost proposal be identical if the costs were identical in the projects if they were two identical projects, one for the State and one for the Federal Government? A. If the specifications were identical, I would say yes.

Q. Ok. Could you give an example of a project that you've built for the State recently? A. The Reserve Street Bridge here in Missoula, Montana was built for the Montana Highway Department.

Q. Did you also build the Missoula Field House? A. We built an addition to the Missoula Field House, yes.

Q. I see. So when you figured your bid for the State did you build in the one percent gross receipts tax or include the one percent gross receipts tax to the State? A. Yes.

Q. And under Section 42-2.14(2-s14010), which is a regulation, the State withholds the one percent gross receipts tax from any payment given to you? A. Yes.

Q. Now, Mr. Moran, I would like to refer back to the construction contract. I would like to look at some specific contract clauses concerning taxes in the document. Would you please refer to the special Montana tax clause?

(Tr. 21)

A. All right, I have it.

Q. Ok, could you read the title of that particular clause? A. "Montana 'Public Contractors' License Fees."

Q. Ok. I notice a beginning sub paragraph a. Could you read that for the record, please? A. "The contract price includes the license fees imposed by the State of Montana on 'public contractors' under the provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, with respect to this contract and any subcontracts awarded here under."

Q. Do you know why that particular clause is included in the contract? A. Merely to call to our attention that there is such a law, I believe.

Q. Now assuming that that contract provision were not there, would you include the one percent regardless? A. Yes.

Q. On a bid to the Federal Government? A. Yes.

Q. And you testified earlier that you do include the one percent gross receipts tax on a bid to the State Government. Do they have such a clause in their contracts? A. I don't believe they do.

(Tr. 23)

BY MR. STRATTON: Q. Mr. Moran, is there any provision in this Federal contract that requires you to put the one percent gross receipts tax in your bid?

MR. POORE: Same objection.

THE COURT: Overruled.

THE WITNESS: No.

(Tr. 25)

BY MR. STRATTON: Q. Now, Mr. Moran, I would like to

(Tr. 26)

refer you to Page 33 of a deposition. I believe it is "Deposition upon oral examination of Merrill A. Moran" taken November 20th, 1975 in Seattle, Washington. On Page 33 there is a question by Mr. Poore. Would you please read that question? A. "And with the knowledge at hand as an officer of your corporation, as an estimator and as a person involved in the bidding process with the knowledge at hand that you are going to have to pay over to the Federal Government the cash refunds that do come on any project pertinent to personal property taxes, it is perfectly obvious to me, and I'm sure controls your thinking, does it not, to crank in your original bid the full one percent tax?"

Q. How did you answer that question? A. My answer was "Correct."

Q. Reading over that question at this time, is that your answer? A. On careful examination of the structure of the sentence, the question is a little bit confusing. If the question meant to ask "Would you include the one percent property tax in your bid knowing that you are going to have to refund part of that tax to the Federal Government", I think my answer would have to be "No" because we include the one percent property tax primarily because it is a State law.

(Tr. 27)

Q. You mean the one percent gross receipts tax? A. The one percent gross receipts tax because it is a State law, not because we have to refund part of it to the Federal Government.

Q. But don't you take the fact that the Government receives refunds of personal property taxes into account when you bid on a Federal project? A. Do I take into account the fact that the Government receives personal property refunds from me?

Q. Yes. A. No. No, we do not. At the time of bidding we have no way of knowing for certain that we are going to receive a personal property tax refund on any particular project nor do we know for certain that we are even going to make a profit on the project. We couldn't take into account a refund we don't know exists.

Q. I see. Do you figure the cost of corporate license taxes in your bid to the Federal Government? A. In describing the bidding procedure I stated that we added an element of office overhead and profit to any bid and in so doing I think we are covering all of the costs that are involved, whether they are a direct cost or indirect cost. We don't, however, really consider a corporate income tax as an element of cost. If we do have a

profit, we consider that corporate income tax is a profit sharing
(Tr. 28)
with the Government agency.

Q. Would that apply to the State as well as the Federal Government? A. Correct.

Q. And in figuring your bid for a private corporation would that apply as well as far as the income taxes are concerned? A. Yes.

Q. Now concerning Government contracts, in your experience are there ever any changes from an initial bid that is submitted to the Federal Government, say, for instance on this job that you performed for the United States on the post office in Billings, Montana? Were there any changes or modifications to the contract? A. Yes, there were.

Q. And do you have to negotiate such changes or modifications to the contract with the Department of Army? A. Yes.

Q. Pursuant to those negotiations do you submit a detailed list of costs occasioned by the change orders? A. Yes, any changes.

Q. Does this list set out separately the one percent gross receipt tax? A. Yes.

(Tr. 32)

BY MR. STRATTON: Q. Mr. Moran, I have a hypothetical to try to explain the mechanics of how this tax works and how it relates to your bids. Assuming that you had a rental rate on equipment used on a construction project for the Federal Government, which included an element of the Montana personal property tax, and that averaged out to be one quarter of one per-

cent of the total cost of the construction project, is it true that prior to the one percent gross receipts tax you would have charged the United States one quarter of one percent for personal property taxes as a cost? A. Yes.

Q. Now the situation after enactment of the one percent tax. You testified that you charged the rental rate as well. The one quarter of one percent tax is still charged to the

(Tr. 33)

United States on construction projects; is that right? A. Yes.

Q. In addition you now charge the United States the one percent gross receipts tax in addition to the one quarter of one percent personal property tax as part of the total cost or contract price to the United States; is that right? A. Yes.

Q. Now the present total is equal to 1¼ percent; is that right? A. Yes.

Q. Including the gross receipts tax and personal property taxes, whereas before the enactment of the one percent gross receipts tax it was only one quarter of one percent? A. Correct.

Q. Now the special Montana tax clause found in sub paragraph e of the special Montana tax clause in Federal contracts requires the contractor to turn over the personal property tax refund to the United States, which is equal in this hypothetical to one quarter of one percent; is that true? A. Yes.

Q. So in essence the difference that the United States paid prior, which was one quarter of one percent, and now, one percent, is equal to ¾ of one percent; is that correct?

(Tr. 34)

MR. POORE: To which we object as leading and suggestive.

MR. STRATTON: I think the figures speak for themselves.

THE COURT: I think it does but I don't think I come out with the same answer you do. Say that again.

MR. STRATTON: Well, Your Honor, prior to the enactment of the one percent gross receipts tax this witness testified that they charged the United States for personal property taxes in their bid and that approximated one quarter of one percent. After enactment of the one percent gross receipts tax that practice was carried forward. They still charge that one quarter of one percent to the United States. In addition the one percent gross receipts tax was charged. So the total would 1¼ percent versus ¼ percent before by reason of the special Montana tax clause. The Government provides that ¼ percent or the amount representing the personal property taxes is turned back to the Federal Government leaving an effective rate of one percent to the Federal Government and the difference between the cost to the Federal Government, which was one quarter of one percent, prior to the tax and the cost now to the Federal Government of one percent is an effective cost of ¾ of one percent.

(Tr. 35)

THE COURT: I don't think that is so because you start with a quarter of a percent. You get a percent and a quarter. Presumably the ¼ of one percent is the amount of rebate that is gotten so aren't you left with one percent —

MR. STRATTON: Yes.

THE COURT: — rather than ¾ of one percent?

MR. STRATTON: You are left with one percent but the difference between the cost prior to the Act which was one quarter of one percent and the present cost, which is one percent, the cost differential is ¾ of one percent.

THE COURT: Yes, that is right.

MR. STRATTON: That is what we were trying to illustrate.

Q. Now, you testified earlier that your company has performed construction contracts awarded by private landowners as well as Governmental agencies; is that correct? A. Yes.

Q. Are you familiar generally with the general nature of public construction projects as compared with private construction projects? A. Yes.

Q. Would examples of large private construction projects
(Tr. 36)
include shopping centers, department stores, bank buildings and office buildings? A. Yes.

Q. Would examples of large public construction projects include such as the United States Post Office you built and G.S.A.-type office buildings? A. Yes.

Q. Consider for the moment a private construction project, an office building privately owned and, on the other hand, a comparable public construction project, a Federal General Services Administration office building. Is the public project intended for the use of the public? A. Yes.

Q. Is the private project intended for the use of the public? A. It is available for public use, yes.

Q. I see. And as far as the availability for public use, is there much difference between a public project and a private project of comparable nature, such as an office building? A. No.

Q. If the public project was inadequate in some particular way would this expose the public to some danger? A. If the public project were inadequate?

Q. Yes. A. Yes.

(Tr. 37)

Q. Would the same be true for a private project? A. Yes.

Q. So in that regard there isn't much difference between a public and private project. If either one were inadequate it would expose the public to danger; is that correct? A. Yes.

Q. Now consider again the same public project over the same private project, office buildings of comparable nature, generally is a public contractor to build either one of those projects experienced in his profession? A. Normally, yes.

Q. And you testified that your company has performed both public and private contracts? A. Yes.

Q. Is there much difference generally between the experience necessary for you to perform a public project versus a private project of comparable nature? A. No.

Q. Now consider again the same public project and a comparable private project. Generally must the public contractor or the contractor performing the public project establish his qualifications to the Governmental

agency awarding the public contract? A. You say generally do we have to?

Q. Do you have to establish your qualifications to the
(Tr. 38)
awarding agency? A. In some instances, yes.

Q. Generally you do? A. Yes.

Q. All right. When you perform a project for a private corporation do you generally have to establish your qualifications as well to the private landowner? A. I don't think they go through the same identical procedure as qualifying a contractor would under a public project.

Q. I see. But you would have to meet certain —

THE COURT: I have a feeling that the bond process qualifies the contractor. But go ahead.

MR. STRATTON: In the bond process?

THE COURT: Sure. Sure, the bonding companies are not going to bond somebody to build a building that's just yesterday built a chicken coop. I suspect that is where you separate the men from the boys in the contracting business because after all it's their money that is on the line when the whole thing is said and done.

MR. STRATTON: Yes, Your Honor. That was the line of my next question.

Q. I was asking you, Mr. Moran, in the performance of a public contract does the contractor invariably provide a bond?
(Tr. 39)
A. Yes.

Q. In the performance of a private construction project do you invariably provide a bond? A. Yes.

Q. Is there any substantial difference between the practice of furnishing a bond with respect to a public project and a private project of comparable nature? A. No.

Q. Consider again the same public project, a G.S.A. office building, and a comparable private building. Does the public project, the G.S.A. office building, normally involve elaborate professional planning and call for mandatory supervision or inspection? A. No more than a private project would.

Q. Now when your company is awarded a public contract do you attempt to make the project when completed as safe as possible for people using the project? A. I don't know as we make it as safe as we possibly can. We are building a project to a set of plans and specifications that inherently make the project safe. We don't make it safe by our own construction methods necessarily. We are following a set procedure that does inherently make the building safe.

Q. But you take pride in your construction work, do you not? A. Yes.

(Tr. 40)

Q. In this post office building that you constructed in Billings, Montana did you see to it it was constructed in accordance with the plans and specifications — A. Yes.

Q. — for safety? A. Yes.

Cross-Examination by Mr. Poore of Mr. Moran

(Tr. 55)

Q. Now is it your testimony to the court that although Paragraph 73 is entitled "Public Contractor's

License Fees", that it had no influence on you whatsoever in including in your information to the bidder the impact, if any, of the Montana gross receipts tax?
(Tr. 56)
A. No.

(Tr. 59)

Q. And is it your testimony that you feel that the cost to the Government, the Federal Government, on any particular job is increased by the one percent that is included in your bid? A. Yes.

Q. Now the historic impact of the gross receipts tax on Sletton Construction Company is ⅓ of a percent; is that not true? A. Yes.

Q. Why don't you include ⅓ of a percent in your bid? A. You are going back to historical cost that has averaged a third of a percent. There are projects that we have bid with various Governmental agencies where we have not received a refund. Consequently it costs us the one percent. We have no knowledge in advance of what refund we might receive on a particular project.

Q. When — A. Consequently we add the one percent in.

Q. If a change order is issued, doesn't the Government allow you to put in a full one percent tax? A. Yes.

Q. Isn't it a fact that they would require you to use your historic experience, namely ⅓ of one percent?
(Tr. 60)
A. No.

Q. Now if the job works out to be ⅓ of one percent, which is what your experience has been, then what be-

comes of the other two thirds of one percent? Doesn't that augment your profit? A. Yes.

(Tr. 65)

Q. I think I'm still confused, Mr. Moran, as to your testimony. Is it your testimony that in your opinion that although the historic impact of the gross receipts tax on Sletton is approximately ⅓ of one percent and although credits are required under your contracts with the Federal Government of personal property tax refunds to be repaid to the Federal Government, is it your testimony that in your opinion the cost to the Federal Government on a particular project is increased by the full one percent gross receipts tax? A. At the time of bidding, yes, at the time of the award of the contract. At the conclusion of the contract, if any refunds are made to the Federal Government our contract was reduced accordingly.

Q. And getting back, the true cost to the Federal Government — to any property owner — is the contract. Then by reducing the amount of the contract the cost to the
(Tr. 66)
project would be dollar for dollar reduced; is that correct? A. That is correct.

Q. So it would not be one percent. It would be one percent less whatever it was reduced. A. Whatever refunds were received, yes.

Further Examination by Mr. Stratton of Mr. Moran

(Tr. 76)

BY MR. STRATTON: Q. Now, in cross-examination I believe you testified that nothing in the terms of the contract require you to pay the one percent gross re-

ceipts tax of a Federal contract; is that true? I was a little bit confused by that. A. No. There is nothing in the contract that requires that I include the one percent tax as part of my cost.

(Tr. 77)

Q. And is it your experience that although contracts themselves over $2,000. are not negotiated but are bid on, isn't it true that large change orders are negotiated rather than bidded?
(Tr. 78)
A. Yes.

Further Examination by Mr. Poore of Mr. Moran

(Tr. 80)

Q. Is it your testimony that you are constantly changing the one percent gross receipts tax up until the last ten minutes of your bid? A. No, because by that time we have determined the range that the bid is going to fall into and whether the gross receipts tax is an exact one percent is really immaterial. It might be 99 percent of one percent or it might be 101 percent of one percent.

Q. So this hypothetical isn't the way you operate in fact. A. In theory you get the same result.

(Tr. 83)

Herbert B. Hallock

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Stratton:

Q. Would you state your name, please, for the record? A. My name is Herbert B. Hallock.

Q. And your address, sir? A. 4733 N.E. Skidmore Street, Portland, Oregon.

Q. And what is your occupation or business? A. I am an accountant.

Q. And who do you work for? A. I work for R. A. Heintz Construction Company.

(Tr. 88)

In your experience how do you calculate the one percent gross receipts tax? A. Well, we don't view it exactly as a direct cost but something that must be added onto our final bid figures so that our net intake from the work will be the amount we believe we should have. In other words, this is about the last figure that would be added on to the bid. We arrive at our total bid price and then add one 99th of
(Tr. 89)
that, to be exact, to come up with the final price.

Q. Okay. Behind you I believe is Plaintiff's Exhibit 2 listing direct costs of $75,000, indirect costs of $20,000, profit of $5,000 and then one percent tax cranked in at the bottom for a total of $101,000. Is that essentially how in your experience a bid or estimate would be prepared for R. A. Heintz? A. Well, a very simplified version of it, yes.

Q. So if R. A. Heintz Company were awarded a construction contract with the Federal Government for construction in Montana, would your company then remit the one percent gross receipts tax to the State? A. Yes, we must do that.

(Tr. 95)

BY MR. STRATTON: Q. Did the fact that you refunded personal property taxes to the Federal Govern-

ment under this particular contract, did that knowledge have any effect on your bidding? A. No.

Q. Did that knowledge have any effect on your inclusion of the one percent Montana gross receipts tax? A. No.

Cross-Examination by Mr. Cosgrove of Mr. Hallock

(Tr. 107)

Q. Mr. Hallock, is the reason that you include the one percent tax in your contract because of the provisions in the pertinent Corps of Engineers contract, knowing that you're going to have to repay any refunds to the Corps? A. Well, that would not be the case in every case because the first contracts we performed under this license law had no tax provisions in them at all and yet we still had the one percent in our bid. So I'd have to say no.

Q. Well, let me go back to that again. Your answer is that the contract provision itself doesn't have any effect on why you include this one percent as a direct cost? A. Not at all. We have a copy of the law when it was enacted and the tax would be a part of our direct costs in exactly the same way that the existence of the sales tax gives rise to an addition to material costs in the State

(Tr. 108)

of Washington.

Q. Do you remember, Mr. Hallock, the deposition that was taken of you upon oral examination on November 20th in Seattle? A. Yes. I have a copy of it here.

Q. On Page 18 a question was put to you by Mr. Poore, Line 13.

"Q. Does it then follow that the Heintz Company

in the protection of its own interests will put into any contract, whether it is an initial contract or an extra, the figure (transcription error) 1% Tax so that it will be able to protect itself when it pays over any credit to the Federal Government? . . . .

"A. Well, of course we would include the 1% Tax as part of the direct cost of the job, knowing that any refund we receive would not be ours to keep, therefore the cost to us is the 1% Tax.

"Q. (By Mr. Poore) Is that your answer? A. Yes."

Now I just want to make sure I understand both positions. You are not saying something different than that here today, are you? A. No, I don't believe I am, no.

(Tr. 114)

Q. I guess my main question is if you know you are going to receive the refund and credits why do you — and you don't have to pay them to the Corps — why do you include the tax of the full one percent being aware of the washout effect of part of the tax? A. Well, if we are looking at a three year contract and we're tied to a labor rate to extend into the contract for perhaps five or six months, we have to guess at the rates the unions are going to extract from the A.G.C. over the following two years, whether it could be five percent or eight percent or nine percent or 11 percent, and our labor cost is 35 percent of the total cost, then the amount of refund that we might obtain on personal property taxes is so insubstantial it just doesn't enter into our calculations. It's a benefit that we will offset against any item that might act against us in the future

(Tr. 115)

on that contract.

Q. In effect it goes into your profit? A. That's correct.

(Tr. 149)

John E. Templeton

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Stratton:

Q. Would you state your name for the record and your address? A. John E. Templeton, 8355 S.W. Seminole Trail, Tualitin, Oregon, 97062.

Q. Would you state your occupation? A. I am an auditor for the Corps of Engineers, United States Army, North Pacific Division.

Q. Could you briefly state your education beyond high school? A. I graduated with a Bachelor of Arts Degree in Professional Accounting from the University of Washington in 1963. I also took a Certified Public Accountant preparation course at the Oswald School of Accounting in Seattle.

Q. What is the title of your present position? A. My present position is Supervisory Auditor for the North Pacific Division, Corps of Engineers.

Q. And what in general are the duties of your position? A. Within the Corps of Engineers my audit staff has a dual function. We are under Army regulations set forth in the Internal Review Office to perform various' type internal audits of various operational elements within the Corps of Engineers, such as our operational dam elements, our engineering division, our comptroller areas — this

(Tr. 150)

type of thing — to provide management with an independent objective of whether these officers are meeting their functions and performing their duties as prescribed. Also we have a second function which has been

assigned to us by the Department of Defense to perform contract audits on cost-type contracts or negotiated procurements that exceed $100,000. on civil funded contracts of the Corps of Engineers. We also do the coordination for the same type of audits that are done on military contracts by the Defense Contract Audit Agency which is a separate agency other than the Corps of Engineers.

Q. So then you are the Chief Auditor of the Northern Pacific Division; is that right? A. Right. Within my staff I presently have 21 auditors working for me located in Anchorage, Seattle, Walla Walla and Portland performing these dual functions.

Q. What is your work experience prior to your present position? A. During the summer of 1962 while I was still in college at the University of Washington I did work one summer for the Central Budget Agency of the State of Washington as an auditor, more or less a trainee-type position with the State of Washington. From June 1963 to May of 1967 I was an officer in the United States Army. From May of '67 I was hired by the Seattle District Corps of

(Tr. 151)

Engineers as a staff auditor where I assisted in the performance of internal reviews and contract audits primarily up in the Libby Dam Project in Montana and I also served on the Contract Board of Awards reviewing procurement awards over $10,000. In March of 1971 I was promoted to the Chief of the Audit Branch of the Jacksonville District, Jacksonville, Florida. There I was in charge of performing within that district. I was responsible for the performance of it and assisted in the performance of the internal audits and contract audits, which one of our major functions at that time was to perform the termination audits for the termination of

the Cross Florida Barge Canal, which was a major project of the Corps that was terminated.

THE COURT: Did they ever finish that thing?

THE WITNESS: Sir, the last I heard, a Federal Judge reviewed it and they went back to reanalyze the environmental impact statements and they are currently doing that and then based on that they will decide whether they go on or not. And I also performed duties on the Contract Board of Awards on procurements over $10,000. In May of 1972 I was promoted to a supervisory auditor position with the Office of the Chief Engineer in Washington, D.C. and performed these functions in the Audit Procurement Division within the Chief's office in

(Tr. 152)

Washington. There we were responsible for supervising — there was three, my boss and two of us were responsible for supervising the 130 Corps auditors spread over the world-wide operation. These duties consisted of staff reviews and audits of various Corps division offices and districts. I acted as a consultant on equipment costs, contractor equipment costs, for the ASPR Subcommittee for Construction (phonetics). I was Army member on the D.O.D. Cost Accounting Standards Board Reviews. I coordinated the General Accounting Office audits and the United States Army Auditing Agency internal-type audits for all Corps activities. I was responsible during that time when Hurricane Agnes occurred to coordinate the Corps audit efforts in response to a request of the Office of Emergency Preparedness for emergency work where we audited contractors plus State Governments. I taught contract auditing to Corps of Engineers accounting officers at Fort Belvoir. I performed actually contract audits in the Washington D.C. area and also in-

ternal reviews within the Washington D.C. headquarters. And my current position I assumed in December of '73.

Q. Ok. Have you ever published any articles? A. Yes. In, I think, it's October of '74 I published an article on the Truth of Negotiations Act which is the act,

(Tr. 153)

the public law, under which we perform contract audits, discussing the contents and the audit procedures as I know it through my experience in the Society of American Military Engineers magazine called *Military Engineer*.

Q. Are you familiar with the provisions and operation of the One Percent Montana Gross Receipts Tax Act? A. Yes, I am.

Q. Are you familiar with the operation of the Act, the refund for personal property taxes and the credits for corporate license taxes? A. Yes, I am.

(Tr. 192)

BY MR. STRATTON: Q. Now the United States Government has certain general provisions in its contracts which are commonly referred to as boiler plate. Without interpreting the meaning of any of these general provisions, could you tell the court what specific provisions you in the course of your duties deal with? Would you please refer to Plaintiff's Exhibit 3, which is the R. A. Heintz contract? A. As I stated yesterday, one of our functions in the Corps audit is contract auditing and during this plus also during our internal reviews in the procurement areas we get involved with certain general provisions and the major ones we get involved with concern change orders or G.P., General Provision #3, the change clause, or General Provision #4, differing site conditions. And

(Tr. 193)
basically all change orders or modifications, however you want to call it, to our Corps of Engineer contracts fall generally under these two general provisions. We also get involved with General Provision #35 which is the Federal, State and local tax clause.

Q. Where are these general provisions found in this particular contract? A. You have a general index and then right behind the general index the general provisions are listed.

Q. All right. You were discussing General Provisions 3 and 4? A. Right. Basically I said these two provisions are the ones under which the change orders that we audit are generally processed.

Q. I notice that at the conclusion of General Provision 3 and also 4 there is in parenthesis the letters ASPR and a number 7-602.3 close parenthesis. Would you just clarify what the ASPR means in the Corps? A. Within the Department of Defense we have the Armed Service Procurement Regulation and this regulation sets forth our procurement procedures within D.O.D. It is paralleled by the rest of the Government agencies by the Federal Procurement Regulation, which is quite similar. The reference you see there is to Armed Service Procurement Regulation Section 7, which is the contract clause section which sets forth which clauses are required for
(Tr. 194)
various types of contracts within D.O.D. And that would be Subsection 602.1 or something like that. So the reference takes you back to the Armed Service Procurement Regulation Section 7.

Q. For clarification purposes, those Armed Service Procurement Regulations are found in Title 32 of the Code of Federal Regulations, Parts 1 through 9; is that

correct? A. Offhand I deal with the regulations, not with the U.S. Code.

Q. Could you tell me what other general provisions you deal with? A. I was just briefly mentioning the Federal, State and local tax provision, #35. We get involved with this at times due to the fact that with any increase in taxes or new taxes the contractor notifies the contracting officer by generally requesting a price adjustment due to these increases of taxes. We get involved in verifying that yes, there is an increase in taxes.

Q. How long has that clause been in the General Provisions, do you know? A. I did some research before coming here through the Audit and Procurement Division back in Washington. It's been in Federal contracts since 1941. There's been a tax clause similar to it.
(Tr. 195)

Q. I notice looking at General Provision 35 that the beginning, the heading there is (1961 August). A. This would be the date that the current clause that that contract had was put in effect in the Armed Service Procurement Regulation.

Q. August 1961? A. Yes. Another clause which to us is important in the change orders since we are there to audit the contract or proposal is General Provision 44 "Modification proposals — price breakdown" and this general provision is the one under which the contractor submits his detailed proposal to us.

Q. On price modifications to a contract? A. Right. Any size under this clause.

Q. Any size modification? A. Right. Now from the audit side, which I will discuss just briefly later, we get involved with just the larger ones. Another general

provision under which we are auditing is General Provision 56 "Price reduction for defective cost or pricing data . . ." and this clause was put in the contract as the result of Public Law 87653, commonly called The Truth In Negotiations Act. This requires a contractor to submit detailed cost or pricing data and then to certify to the Government that this data is current, accurate and complete as of the date

(Tr. 196)

of the final price agreement. General Provision 58 "Audit by Department of Defense" is a clause that relates to General Provision 56 in the fact that this clause gives the auditors the right and access to all records of the contractor in connection with this procurement.

Q. In connection with the Federal construction contract? A. Right.

Q. Is that what you mean by procurement? A. Well, from the auditor's standpoint also we do get involved in looking at other records because certain costs he proposes to use may also deal with his private sector and we look to see that these costs are being properly allocated among both sectors by determining an overhead rate.

Q. To make sure there is no distortion? A. In the proposal, this type of thing. So under that clause the auditors only interpret this as saying all records that we feel are pertinent to pricing the procurement.

Q. So that gives you authority to inspect any of the contractor's records? A. We feel this way.

Q. I see. Are there any other general provisions that you deal with? A. G.P. 66, which is that special Montana public contractor's license fees. We get involved there in checking to see

(Tr. 197)

that the refunds, and in some instances if the clause is a different one, the credits are given back to the Department of Army.

Q. I see. I notice in Plaintiff's Exhibit 3 that this clause is not the current clause; is that correct? A. In this contract, right. But this clause was modified back, I believe, it was in December of 1971.

Q. So that would be indicated on the first two pages? A. I don't have a copy here but there's a teletype that went out to R. A. Heintz to notify him of the change in the clause that he was supposed to take his refunds and credits.

MR. POORE: What clause was that again?

(Tr. 200)

MR. STRATTON: It shows that the United States Government included the one percent gross receipts tax in its Government estimate as did the contractor in his original bid. It also shows that the computations done independently by the United States Government came very close to the computations of the bidder. It is also to show there is really not any guess work when it comes to bidding; that bidding is a very precise task that is performed by a contractor and this document states that fact. If you will notice on —

THE COURT: Why wasn't it included in your pretrial exchanges?

MR. STRATTON: Well, Your Honor, #13 of the pretrial exhibits says "Construction contracts and modifications"

(Tr. 201)

and this in essence is an adjunct of a Government contract. As I say it is done merely for the purpose to

illustrate that the one percent tax is cranked in and shouldn't come of any surprise to the defendants.

THE COURT: Well, if that is the purpose just ask him if when the Government estimates these costs they crank in the tax. I guess that proves all you are about to prove, doesn't it?

MR. STRATTON: Yes, Your Honor.

THE COURT: All right, do it that way then. So the objection is sustained.

(Plaintiff's Exhibit #9 Offered and Refused by the Court)

BY MR. STRATTON: Q. Mr. Templeton, you have before you the United States Government estimate which relates back to Plaintiff's Exhibit 3 which is the—

THE COURT: Well, let's put it this way. Mr. Templeton, when the Government estimates the cost of Government projects in Montana, do the Government estimators calculate the Montana gross receipts tax?

THE WITNESS: Your Honor, yes, they do.

THE COURT: At what figure do they calculate it?

THE WITNESS: They use, like the contractors do, a one percent rate. And in one instance that I reviewed,
(Tr. 202)
which is the Exhibit #3, where we've had submitted the bid on Exhibit #3, the Government's figure is roughly within several hundred dollars of the contractor's figure.

(Tr. 208)

BY MR STRATTON: Q. Now the one percent Montana tax appears on the surface to be a simple tax. However to fully understand the actual cost effect on the contractors, the United States and the State, it may

be a complex problem. I requested you, based on your knowledge of tax administration, Government accounting, Government auditing and the United States Government procurement procedures, to develop a hypothetical and three flow charts to explain the effect of this one percent tax. Do you have those documents before you? A. Yes, I do.

(Tr. 209)

MR. POORE: What are the numbers on these exhibits?

MR. STRATTON: This is Proposed Exhibit 11. This one is 12, 13 and 14.

BY MR. STRATTON: Q. All right, Mr. Templeton, you have before you Plaintiff's Proposed Exhibit 11.

MR. POORE: If it please the court, for purposes of objection, we object to the Proposed Exhibits 11, 12, 13, and 14 and recite to the court that the deposition of Mr. Templeton was taken according to agreement and stipulation by our journeying to Seattle November 20th, 1975. So at that time there was a discovery deposition. Also there was in addition to Mr. Stratton (sic), the co-author of the audit report. We concluded that deposition with "Mr. Poore: Is there any other area that we have not covered with this witness?" "Mr. Stratton: No." The deposition then adjourned to Great Falls, Montana and I think it was December 3rd and I believe that Mr. Templeton was present in Great Falls. Am I right or wrong on that? I may be in error.

MR. COSGROVE: He was there.

MR. STRATTON: He was there.

MR. POORE: Both of the gentlemen were there. Then we have had an attorney's pretrial conference in Helena,

Montana in January of 1976. Both of the Government auditors were present at that time. We have

(Tr. 210)

had a pretrial conference — or rather a supplemental one — approximately two weeks ago I think to the day before this presiding Judge, this Honorable Court, at which again I believe both of these gentlemen were present. Pursuant to the admonition of the court we immediately met with counsel for plaintiffs after the session yesterday. We were not given an idea of these exhibits and I specifically asked Mr. Stratton if this was it and he advised me generally what was to be covered today. From what followed yesterday afternoon I was advised he would be talking about change orders which, of course, was touched on in the depositions. We represent to the court that with the predicate of Mr. Stratton requesting the witness to develop a hypothetical to explain the effect of the tax, which is certainly one of the issues in this case, that the spirit of the pretrial order and the spirit of the discovery schedule has not been adhered to and we object to each and every of the proposed exhibits.

MR. STRATTON: With all due respect, to Mr. Poore, in the deposition that was taken in Seattle, Mr. Templeton discussed a hypothetical and Plaintiff's Proposed Exhibit #11 is merely an extension of that hypothesis. And all of the foundation was laid during that deposition. This certainly can come of no surprise.

(Tr. 211)

You were aware of that. And Plaintiff's Proposed Exhibits #12, 13 and 14 are merely aides that I asked Mr. Templeton to draw up to illustrate the effect of the tax. His testimony during the deposition certainly covers these points and these were finalized as of last night. It

was not possible to give you copies before. I gave them to you the first thing this morning as soon as I could.

MR. POORE: I stand on the representation I have made.

THE COURT: I suppose what this witness could do, and there wouldn't be any objection about it, he could go to the blackboard and could be asked a hypothetical question and then on the blackboard he could put all this information and here we'd be with it. This is simply, I think, a more convenient way of doing it. I am going to let it in because I think it's a handy tool and it lays the Government's position with respect to it out in black and white. And if it's wrong, it performs a convenient — it serves as a convenient target for you to shoot at. But it looks to me as though its simply arithmetic that I could work out for myself given enough time and study. So the objections are overruled. Exhibits 11, 12, 13 and 14 are admitted.

(Plaintiff's Exhibits #11, #12, #13, and #14, Received in Evidence)

(Tr. 212)

THE COURT: I may say that I don't think the Government has been as careful in the preparation of its — well, in the pretrial disclosure as it should have been. And if I felt that this were anything that were very complex or that required much study, my rulings would probably be different. So go ahead.

BY MR. STRATTON: Q. Mr. Templeton, on Plaintiff's Exhibit #11 I notice that there are three headings. One "United States", two "State Government" and three "Private owner." You list certain direct costs, indirect costs, profit a total amount and then the one percent gross receipts tax. Could you explain that in

more detail, please? A. Basically what Mr. Jensen and I did last night was take your Plaintiff's Exhibit #2 figures and try to present something which would show the actual cost effect on the owner who may be a private individual, for private work, the State Government or on the United States Government or local government agency that is not a State Government to depict what would be their cost due to the tax and to put it in a simple format. Also to show what the effect is to the contractor in the way of what he is left with because of the tax in costs and money and also to show the effect on the State treasury. So we started with
(Tr. 213)
Plaintiff's Exhibit 2 and then mainly expanded that.

Q. I noticed comparing it to Plaintiff's Exhibit 2, the first set of figures under "United States" listing the total award costs of 101,000 is the same for the State Government award costs, 101,000 but there is a new column added in addition to Plaintiff's Exhibit 2 and that is the private owner. It looks to be there's an item called "Final cost to owner" 100,000 compared to the 101,000 for the United States and State Government. Would you explain that? A. A private owner does not pay the one percent tax, only public works contracts do.

Q. I see. Now I notice a line drawn under what is comparable to Plaintiff's Exhibit 2 and you have additional information "Personal property tax refund." Under the column "United States personal property tax refund $346." "Corporate income tax credit $194." and under "Unrefunded tax balance $460." For a total of one percent tax of $1,000. I notice that those figures are carried under the State Government column as well but not under the private owner. Would you explain that, please? A. All right. The break out or the distribution or allocations we made were based upon our

random sample audit report so that the ratio of personal property tax is the same ratio we had for out-of-state contractors on
(Tr. 214)
our random sample. So the total amount of both property tax refund and corporate credit come to what the random sample showed. That is how our allocations occurred. The unrefunded portions relate to the amount that our random sample showed would be left in the State treasury.

Q. Excuse me. Is that the figure that is also found in the pretrial order in stipulation ".46 percent for out-of-state contractors"? A. Yes, it is.

THE COURT: That's why I don't understand what we are doing. You stipulated as to the percentages of this tax that are actually a cost and I don't know why we need to gild it so much because when we get through with this we know exactly what we know when we read Paragraph 19 of the pretrial order. Do you know anything different?

MR. STRATTON: Yes, there is, Your Honor, and that is in the bottom portion of this exhibit. And I think I'll ask Mr. Templeton to explain that as briefly as possible for the court and show the difference.

THE WITNESS: Basically what we come up with is — and our flow charts show the same thing under the heading of United States or nonstate Government agency, private owner or State agency or State Treasurer — that the final cost to the United States Government is $100,654.
(Tr. 215)
for a comparable project. The final cost to a State Government is $100,346. while the final cost to the private owner would be 100,000. So due to the tax it

costs the United States Government or a local government agency more money than anybody else for the same project.

BY MR. STRATTON: Q. All right. Now turning to Plaintiff's Exhibit 12, could you briefly explain that? A. Plaintiff's Exhibit 12 describes what I have just said but it shows one thing added and that is that doing private work the contractor after paying his corporate income tax would have left $99,806.

Q. Rather than the 100,000? A. Yes.

Q. And the State treasury would be increased by $194? A. Yes.

Q. That's the total outstanding on the private project? A. Yes.

Q. I notice there is not provision for personal property taxes. Is that because the personal property tax is paid to the county? A. Right. It's paid to county government.

Q. So that would not go into the State treasury? A. Right. In this hypothetical the personal property tax, of course, is built into the $100,000. award price.

Q. Turning to Plaintiff's Exhibit 13, would you briefly
(Tr. 216)
describe that document? A. This flow chart — the important thing about this shows that, like I said before, it would cost the State for the same project $100,346. or $540. more than the private owner but the contractor also would be $540. richer for doing this public contract than doing the same one in the private sector because of the refund he gets for personal property taxes and the credit he gets for corporate income tax.

Q. He is $546. richer? A. By doing the same project for the State Government, yes.

Q. I see. Is there anything more on that chart that is pertinent? A. No.

Q. Now turning to Plaintiff's Exhibit 14, could you briefly explain that? A. This one shows what it would cost the United States Government, mainly the Department of Army, since the Department of Army is unique in that we have a clause where the contractor has to refund the personal property tax back to us so what it shows here to us is that the contractor would get $100,194, which is slightly less than he'd get doing the State job. And the reason why is that the refund comes back to us of the $346. So the net cost, like the other exhibit showed, #11, to the
(Tr. 217)
Federal Government would be $100,654. while the State treasury gets the corporate income tax of $194. plus the $460. unrefunded one percent tax.

Q. Is that all concerning that document? A. Yes.

Cross-Examination by Mr. Poore of Mr. Templeton

(Tr. 263)

MR. POORE: We'll be dealing with 11, 12, 13 and 14 I guess.

Q. At the top left column of Exhibit 11 is the handwritten label "U.S. or other than State Government agencies" and the "U.S." of course is United States, Mr. Templeton? A. Yes.

Q. And "Other than State Government agency", would that include school districts, and counties? What would it include? A. It would include any separate funded agency that is not funded out of the State treasury. An example would be the City of Missoula here.

Q. And it would include whatever number of State or local governmental units that do not receive their funds

or have an account in the State general fund in Helena? A. Yes.

Q. Ok. The middle column is "State Government". Do you equate that to the Government in Helena, the general fund in Helena? A. Yes.

Q. Then "Private owner" and I'm sure I understand that is any person who is not affected directly by this gross

(Tr. 264)

receipts tax, if you will, public versus private, is that right? A. Yes.

Q. Going back to the lefthand column again as you explained it on your direct examination, and we won't be laborious with this, you have in effect recapitulated a previous exhibit and adopted this hypothetical $100,000. contract for construction of some project? A. Yes, it is the same hypothetical previously used.

Q. For this hypothetical to exist you would have to — in all three categories there would have to be a building contract, would there not? You are talking about somebody letting a contract? A. Yes.

Q. It's a contract for the construction of some project in Montana. And then it is clear that you have direct costs across the board of $75,000, indirect costs across the board of $20,000 and profit across the board of $5,000. I believe you hypothetically assumed that this was a corporation — which I am willing to accept — is that right? A. Yes.

Q. All right. Also in your hypothesis, the contract is profitable because it does include both a $5,000. specifically identified profit and deals with a corporate

(Tr. 265)

license tax to the State of Montana; is that right? A. Yes.

Q. Now the first two columns, when you add them up, the award cost is 101,000 to the Federal Government and all State or local or county governments other than the State of Montana is 101,000 identical; is that right? A. Yes.

Q. Of course for the private owner it was 100,000 because he is not involved in the gross receipts tax; is that right? A. That's right.

Q. Then going down further on the lefthand column, you took the personal property tax refund from the general figures of your — from the figures arrived at from your random sample? A. Yes, the share.

Q. Right. A. The percentage was used to allocate. In other words, if you went back in the random sample and you looked at of the total reduction in the one percent payment roughly 34 percent or 34.6 percent of that was for personal property tax.

Q. Right. So this first column is the refund of personal property tax to the contractor? A. Right.

(Tr. 266)

Q. And under the Federal plus all of the various State contracts by school districts and counties, cities, the refund to the contractor is $346. It is also $346. in the middle column to the State itself where the State is the awarding agency? A. Yes.

Q. Then the next line down, since this is a corporation that has been awarded this contract and since the contract is profitable, there is a tax credit, an income tax credit we could call it I think, of $194. under the column of the Federal Government and a like amount in the column to the State? A. Yes.

Q. Then it gets kind of faint. I guess it's unreturned — A. Unrefunded.

Q. Excuse me, sir? A. Unrefunded.

Q. Unrefunded tax balance. This is where it did not wash out or zero out. And there is a balance of $460. This is the Montana gross receipts tax, is it not? A. Right, this would be —

Q. The balance of it? A. This would be the balance, the unrefunded or uncredited balance.

Q. So those are identical so far in the two columns. Then you

(Tr. 267)

totaled those and accounted for 100 percent of the $1,000. of tax that this particular contract generated; is that right? A. Yes.

Q. Ok. Then attached onto my copy and I guess it's on yours too — A. I have it here.

Q. — is another pair of columns intended to match, it looks to me like, on the first two columns. "U.S. or other State Government agency", that is the same categorization as immediately above it, is it not? A. Yes.

Q. The other column "State Government" is the same categorization. Then you take, and here I'm going to ask you to please correct me where I have misconstrued what you have done, the United States gets back the $346. personal property tax refund from the contractor and that would be by virtue of the terms of the contract with the Corps of Army Engineers? A. Right. So only the Department of Army contracts which include that clause would get the refund back.

Q. Or any other Government agency, to borrow your phrase, that was smart enough to put such a clause in their contracts? A. Right.

(Tr. 268)

Q. Then going over to the State Government, the contractor gets back the $346. of personal property tax because he had paid it and can produce vouchers to the Department of Revenue and he receives that refund and, as you put in there, and he keeps it. A. Right.

Q. In your next step, #2, as it is on my copy here, over on the lefthand side under the U.S. column, then the contractor gets $149. corporate income tax credit? A. 194.

Q. Yes sir. Did I misspeak myself? The $194. corporate income tax credit. I'm reading on "At this time the State Treasurer would transfer this amount from the one percent tax fund to the General Fund." And you put the same language over there in the middle column for the one under the State Government; is that correct? A. That's right.

Q. Is that important to your conclusions that at this time the State Treasurer would transfer the amount from the one percent tax fund to the general fund? A. It was just to keep it straight in my mind from a Governmental accounting sense. This is just a paper shuffle within the Treasury just like we do in the Federal Government in our treasury.

Q. So do you want us to leave that in there or is it something

(Tr. 269)

we can eliminate or are we supposed to retain that? A. Just leave it.

Q. All right, the third item on the lefthand column is "The unrefunded tax balance of $460. stays in the State —" and you'll have to help me there. What is that little "stays in the State — A. One percent tax fund.

Q. "One percent tax fund. Eventual transfer to the general fund." And the identical language appears under #3 for the State Government; is that right? A. Yes. The point there is that within the State Government the money never leaves the State Treasury.

Q. All right. Then you draw a line and you have some, I think I would say, conclusions or computations or you did something with figures to arrive at a final cost to the awarding agency in the lefthand column as $100,654. and the final cost to the awarding agency in the State Government is $100,346. A. That is correct.

Q. Obviously these are not equal. Now in the lefthand column where did the 100,000 — the lefthand column is the Federal and other State Government subdivisions — where did the 100,654 come from? A. That would be the $101,000. that would have been paid to the contractor less the Department of Army refund we
(Tr. 270)
received for the $346. personal property tax. So we pay out initially $101,000. from the Department of Army but we get a refund back at the end and the project costs on our ledger would wash out and come down to 100,654.

Q. Ok. Now going over to the State Government, you had a similar, or at least a similar categorization, conclusion "Final cost to the awarding agency of $100,346." Now would you tell us how you arrived at that figure? A. Well, the $1,000. tax payment, since the State withholds that payment from the contractor, we pay the contractor only $100,000. The State Treasurer, meanwhile, or the accounting agency within the State would make a book entry moving $1,000. over to the tax fund. Upon the refunds, when they come, they

would wash these out against the amount in the tax fund. The contractor gets a check for $346. personal property tax. The State Treasurer would then transfer the $194. corporate income tax to the general fund and eventually the remaining balance would more than likely get washed to the general fund. So in the end the State's true cost is $346. which is paying the contractor for his personal property tax.

Q. Now you started the top of your assumed hypothetical and you use the words down here "Awarding agency" and at the top of it you have "Award costs". Now correct me if I am wrong in the way I explain how you got the $100,346. I'll
(Tr. 271)
go step by step so any confusion won't spill over onto you. You take this award cost to the State Government of $101,000. — the middle column up there? A. Yes, I'm with you.

Q. And if you subtract from it the corporate income tax credit of $194. plus the $460. of unrefunded tax balance, you subtract the combination of the two, would you end up with $100,346? A. Yes.

Q. Am I correct in this — and you've done it here — what you have done is you take these two figures that we just talked about, the 194 and the 460, and you deduct it from what you call the award costs or the contract cost to the awarding agency, the $101,000? A. Your method comes up with the same effect at the end but as an accountant, we have a means by which whenever you analyze a transaction or find something that is difficult to analyze we use what is called T accounts. And this is a basic bookkeeping-type thing where you draw your T account and flow it. In this situation it ends up the same. I personally like the ap-

proach I use, which is the flow account method, to trace it the way it occurs in that the $100,000. gets paid to the contractor, the State Treasurer actually does issue a check. And as an auditor this is something I could follow if I ever

(Tr. 272)

wanted to follow this. Two, I would see a paper by the State Treasurer transferring $1,000. to the tax fund from the general fund. Then I would see another document, as an auditor, which came in and showed a payment from the tax fund by the Treasurer of the personal property tax $346. The next thing I would see is another paper documenting the transfer of the $194. from the tax fund for corporate income tax credit to the general fund and with that the general ledger accounts for the Treasurer for that project would then show, if he allocated the personal property tax to the particular project, 100,346. That to me as an accountant, not a lawyer but as an accountant, is a clear flow of how the costs occurred and what the end result is. And that's how we achieved our 100,346.

Q. To me as a layman and a lawyer, we get the same thing by taking the final award cost at the top of the page of $101,000. and just subtracting Items 2 and 3 in the middle column. A. But you lose — until we flow charted it, I didn't see it until last night and neither did Norm Jensen, my cohort, until we flow charted it out we really didn't realize the end result of the tax as passed appears to us to be the State is now paying the personal property tax of the contractor. And it clearly shows when you flow chart

(Tr. 273)

it out.

Q. All right. Then you endeavored to compare — then your conclusion is the final cost to the awarding agency,

you take and compare $100,654, and there again you took the $346. off of the $101,000. and you compare that with the 100,346 and you conclude that the cost to the Federal Government or to any other State of Montana awarding agency other than the State itself would be greater than to the State itself? A. Yes.

Q. Now integral to your — a necessary part of this is to take the $194. of corporate income tax credit and take it away from the $100,000. figure that we've already talked about? A. What do you want me to do now?

Q. Well, you've already testified that the $100,346. is arrived at by taking $654. from $101,000. and part of that is the $194 corporate license tax credit; is that right? A. Basically what I testified to was that the $1,000. is where the adjustment is taken, the $1,000. that has been already transferred to the State tax fund. But the adjustments for personal property tax and corporate income tax credits are taken against the $1,000. That $100,000. becomes a contract cost and is processed on a

(Tr. 274)

separate check.

Q. But it's the same thing? A. If you went to audit the State of Montana records you would not find a check to the contractor for $101,000.

Q. But to have the cost, the final cost, to the awarding agency you have to apply that $194. corporate license tax to that. You have to apply it to the original awarding cost in some manner, do you not? A. That's a division of the profit factor.

Q. But it's there. A. Well, I think I like the definition that Mr. Moran gave, which is that until the proj-

ect is done you don't know if you are going to have a profit. You hope for a profit. When you get done you then share this luck with Government agencies.

Q. The award cost to the State Government was $101,000. per your Plaintiff's Exhibit 11. The final cost to the awarding agency is $100,346. That's a difference of 654 and that amount can be arrived at by the figures that are given in the middle of Exhibit 2 in column — the middle column — of $194. corporate license tax and $460. balance of Montana gross receipts tax, can it not? A. Yes.

Q. Ok. Let's go on if we can —

THE COURT: Before you leave this I have a question.

Examination by the Court of Mr. Templeton:

(Tr. 275)

Q. In connection with the corporate license tax, are you conceiving that this $194. in corporate license tax is all generated by the profits from the contract? A. Yes sir, Your Honor, in that the $194. would be the same in this example for the private job, the State job —

Q. No. Is this profit all generated from this contract, this tax? A. In the hypothetical, yes. We assumed that.

Q. You see it wouldn't work out that way if the contractor made money in the private sector and the public sector and managed to get the corporate license tax credit for both. Then of course, the cost to the State — you couldn't deduct it all in determining the cost to the State. A. Well, Your Honor, the way it works, he files for personal property tax refund —

Q. I'm not worried about the personal property tax. A. Well, it's the same with the corporate tax. It could

relate to the private project. He gets a credit against the amount on the public job.

Q. If the State were going to tax him for that $194. anyway, you see they are entitled to that on account of other profits that he's made. So you can't say that this is a cost —
(Tr. 276)
A. To the State.

Q. To the State or — no, that this is a reimbursement to the State because it isn't if this is generated somewhere other than in the contract. A. That's why we went the other way to bring it from a contract cost — that actually the only cost that comes is the check to the contractor to the State plus the check from the personal property tax.

Q. But I think that is a vice that is inherent in it because in many cases the contractor might be getting a credit for corporate income tax that had nothing to do with the job that they would have gotten anyway, in which event the cost to the State is greater than you show it here. A. Yes, it would go up.

Further Examination by Mr. Poore of Mr. Templeton:

Q. Now as I understand your testimony, Mr. Templeton, you are in this example assuming, I think, as you said, as with the Federal Government it all goes into one big pot, that you clear it all into the general fund and that is the ultimate of what you do? A. Right. Within Governmental accounting a lot of money transfers but it's all done on paper. People really don't have their hands on it.

Q. That's comparable to your Federal Government too?

(Tr. 277)
A. Yes.

Q. Ok. Well then following that along a little bit, referring to the lefthand column of Plaintiff's Exhibit 11, the award cost to the Federal Government of this particular contract was $101,000. What you are trying to find out is the final cost to the Federal Government, which is the awarding agency. Isn't that what you are trying to do? A. Yes.

Q. And as you have already testified, this is based upon a firm contract? A. An agreement.

Q. Right. Ok. And that is profitable to the performing contractor? A. Yes.

Q. So he earns and must pay Federal income tax, Federal corporate tax? A. Possibly. Probably.

Q. Absolutely. A. We didn't consider the Federal taxes.

Q. No, that is my job now. A. Ok, go ahead.

Q. So we list these things and it all goes into one big pot you've been talking about. So there, first of all, is the Federal corporate tax and what are the rates of Federal corporate tax as opposed to the State of Montana
(Tr. 278)
tax which, I think, is 6¼ percent?

MR. COSGROVE: I think 6¾.

BY MR. POORE: Q. 6¾. In other words, this $194. was generated on a 6¾ basis. What is the Federal corporation tax rate? A. I'm not a corporate tax auditor. I don't know. You tell me.

Q. How does 52 percent grab you? A. That's what I thought it was.

Q. Versus 6¾ percent?

THE COURT: It grabs you pretty heavy if you're paying it.

(Laughter)

BY MR. POORE: Q. This is a firm contract that the Federal Government has with a contractor so he has employees so there will flow to the Government the employees' individual income taxes, whatever they are; isn't that true? A. Based on the salary of the corporate people.

Q. True. If there are subcontracts, the subcontractor, if it's profitable, would be paying corporate license tax to the Federal Government or could? A. Could.

Q. If the subcontractor has employees, they'd be paying individual income tax to the Federal Government on their
(Tr. 279)
salaries or wages if they were sufficient to generate a tax? A. (No response)

Q. So if you are going to allocate back to the State of Montana the impact of the Montana license tax, which is $194, isn't it fair to allocate back to the cost of the project for the Federal Government the sum total of whatever these would be? A. What you're trying to do —

Q. No, just answer my question. A. I did not — in our hypothetical, which you are missing Mr. Poore —

Q. Just a second. A. We did not include —

Q. No, just a second. Just a second.

THE COURT: Go ahead, let him answer.

BY MR. POORE: Q. I'm sorry. Go ahead. A. In our — in the way we developed the 100,346 we did not consider the 194 as a cost. Therefore, to do it in this instance would be inconsistent. It wouldn't be on the same basis, you see, because again we looked strictly at the cost to the awarding agency plus the personal property tax check. We didn't take — in this hypothesis we did not take or even refer to the $194. as being anything because the State gets it on all three

(Tr. 280)

projects. This is the thing, that all owners — you know if a guy is doing work on a U. S., local government, State or private contract, he pays Federal corporate taxes. He pays State corporate taxes. However only the public contracts carry the one percent tax. So here we have public contracts carrying three taxes and we have private contracts carrying only two. So there is a discrepancy.

Q. Thank you, Mr. Templeton. We offer in evidence Defendant's Proposed Exhibit B for illustrative purposes on the cross-examination of the witness.

THE COURT: Very well, Exhibit B may be admitted.

(Defendant's Exhibit B Received in Evidence)

BY MR. POORE: Q. Going then to Plaintiff's Exhibit 12, Mr. Templeton, do you have this convenient to yourself? A. I've got one but mine is not numbered. Is 12 the private owner?

Q. Yes sir. A. Ok.

Q. Why don't you write on it and we won't get mixed up. I want to trace through what I think that you have written here. The little moon or little circle at the left is labeled "Private owner" and is this the final cost to the

(Tr. 281)

private owner or would you tell me what is the $100,000? A. It represents the final price to the private owner.

Q. Ok. Again a firm contract is involved. You call that the contract award — A. Yes.

Q. — at the top there. And there are arrows that go to the contractor so he has been awarded this contract. Then the middle one he performs some work apparently and then he — that next little arrow goes back and he requests payment from the private owner; right? A. Right. He's completed the contract.

Q. He has completed the contract and he gets a payment of the full 100,000? A. Yes.

Q. But then you take off of that a certain figure, do you not, for the contract because the 100,000 doesn't end up in the circle for the contractor. A. He pays his corporate income tax. We didn't figure it but there would be Federal taxes in this.

Q. All right. So again that $194. that we have been working with, you take this off for the contractor and send it down to the State Treasurer? A. Right. Because in these flow charts is where we started looking at what does the contractor gain on this tax and we felt that was quite informative after we got done.

(Tr. 282)

Q. In fact you helped me to suggest to myself that the contractor could also put another arrow down there of Federal license tax, could he not, and should? A. Federal license tax? I'm not —

Q. Federal corporate tax, excuse me. Federal corporate income tax. A. Right, because whatever he paid

would reduce — on the particular contract allocable to it — would reduce the 99,806.

Q. So on my copy I just wrote another arrow coming down from that fund. That goes to the Federal Government, doesn't it? A. Yes.

Q. So I made myself a little balloon on the righthand side to the Federal Government. Under your exhibit you sent the $194. to the State Treasurer? A. Yes.

Q. Turning to your Exhibit 13, sir — A. Is that entitled "State Contracts"?

Q. Yes sir.

THE COURT: Yes.

THE WITNESS: Ok.

BY MR. POORE: Q. Well, going back to #12, what is your conclusion from Plaintiff's Exhibit 12, that the State ends up with $194. out of the private contract?
(Tr. 283)
A. It ends up with the taxes it would always get.

Q. In this example the $194? A. Right. Basically on that one I'd say when you compare all three together, the top two balloons, the private owner cost and the contractor cost is what these flow charts really bring to light I think.

Q. And in addition to that the conclusion is that the Federal Government gets some tax from the contractor; is that correct? A. Pardon me?

Q. The Federal Government also gets some tax from the contractor? A. Right. We didn't put that in the hypothesis but that would be true.

Q. Going over to 13, on the left side it says "State agency". That would be, as you have defined it, the

middle column of Exhibit — A. It could be the Department of Transportation or something like this.

Q. A department of the State? A. Something like that.

Q. Ok. Again it awards a contract to the contractor and this $100,346. is the same figure as the $100,346. in the middle column of Exhibit 11? A. Right. We tried to trace everything, keep everything on
(Tr. 284)
exactly the same dollar figures and amounts and keep it all tied together.

Q. Then the contractor, after he gets that $100,346, you have him disbursing it to the State Treasurer in the first arrow — well, first he gets the 100,000 and the second arrow there is property — let me see — a refund request from the contractor to the State Treasurer for the $346. which is the — A. Personal property tax.

Q. The personal property tax of Exhibit 11. And he requests $346. and he gets — the $346. comes back to him; is that right? A. Right.

Q. Now over on the left there are some arrows from the State agency down to the State Treasurer. Could you explain those? A. Ok. Basically that was — our Government accounting notes that, one, that normally before an agency can award anything it has to have availability of funds.

Q. Pardon me, sir, I didn't hear that. A. Before a control — the internal controls within a Government agency, State or Federal, is that before award you always make sure you have an availability of funds. This is —

Q. What kind of funds, sir?

(Tr. 285)
A. Funds, contract funds.

Q. An availability of funds? A. Right. So the comptroller-types notify the people awarding that "Yes, we do have enough money to cover the contract up to so much amount." The awarding agency would then award that contract. When the work gets done and payment requests are received, then they go back and request a check less the one percent tax be issued to the contractor.

Q. And it is integral to the hypothesis here that the awarding agency must have funds available before it embarks on the letting of a contract? A. Yes.

Q. What you are doing is endeavoring to account back against that fund? A. And to show that that is a paper transaction there and that those funds don't actually — aren't transported over to the awarding State agency and he holds them until he gives them to the contractor.

Q. There is no question in your mind, is there, Mr. Templeton, that as to your Exhibits 7 and 8 the reference to the dollars there being held by the State of Montana pursuant to the court order and the stipulation are actual dollars and that they exist? A. I am sure that the State Treasurer is solvent.

(Tr. 286)

Q. And that if money is deposited in U. S. Treasury Notes, that those notes or bills exist and are bearing interest? A. I'm not that familiar with it. If they are in notes, they would be bearing interest.

Q. And that they exist. They are not just a figment of any accountant's imagination? A. Your interrogatories state they exist.

Q. And you don't challenge it? A. No, I don't.

Q. Going on to 14 —

THE COURT: Well, I have a question about this one now. If I understand you right, when the State Treasurer pays the contractor, he pays him the contract price less one percent so if the contract price is $100,000. —

THE WITNESS: In this instance, $101,000.

THE COURT: I see. So they pay him roughly $100,000?

THE WITNESS: Right.

THE COURT: Ok.

BY MR. POORE: Q. Actually this was originally 100,000 and with the transfer of the refund back it became $100,346? A. Right.

Q. It took two steps to get that up to the 100,346? A. No, because the one check comes from the State Treasury of 100,000 plus later the $346. check.

(Tr. 287)

Q. Those are one, two, those are two separate things? A. But the difference between that and the private is $540. The contractor's net gain on the private would have been $540. less due to the fact that now through the corporate income tax credit effect he himself gets advantage of $540. which would be the $346. check he gets back plus the fact that now he doesn't have to remit a check for corporate income tax.

MR. POORE: I don't understand that.

THE COURT: I don't either.

BY MR. POORE: Q. This contractor in Exhibit 13 is the same contractor in 12, is it not? A. Ok. What

we're talking about here is that under a private contract of course when he pays his corporate income tax he remits a check for $194. to the State Treasurer for the corporate income tax. In this situation the State, in essence, transfers $1,000. over to the tax fund in his name for future refunds of personal property tax and corporate income tax credits. So now rather than remitting a check he sends in his corporate tax refund and takes a credit against the $1,000. in his name over there that the State has paid in and so he gets his $194. paid for by the State Government.

Q. Under 13 the State, which is the State contract, this
(Tr. 288)
contractor would also, of course, have to remit his various categories of income tax to the Federal Government would he not? A. Yes, just like you would in private.

Q. In fact we could add, could we not, any Federal fuel tax over here to the exhibit if it's all one big accounting — arising out of this contract if it was of a nature that would involve fuel and Federal tax on fuel, this would also go to the coffers of the Federal Government, would it not? A. Like a State fuel tax?

Q. Sure. A. But in this instance again the Federal fuel tax is a tax that applies not only to the public sector but the private sector, while the Montana one percent only applies to the public sector.

Q. In your 14, sir, could we trace that through? Again the categorization is the U. S. and not all of the agencies of the State of Montana but your only categorization is between the U.S. and, for example, school districts? A. As we said, separately funded-type local interests.

Q. And again you start off with the category of the U.S. or non state Government and there $100,654. is the figure that you've got here at the bottom of the first column of Plaintiff's 11?
(Tr. 289)
A. Right, because when we — when the contractor after awarding does the work, when the agency pays him, they issue him a check for $101,000. to the contractor. The contractor then receives this check and under the State law remits one percent or $1,000. to the State to hold in the tax account for him.

Q. That's the arrow coming down to the left here?
A. Yes.

Q. Ok. A. He then files his personal property tax refund of $346. and lists his corporate tax credit of $194. receiving back from the State then a check for his personal property tax of $346. Now only the Department of Army who has the clause gets back then the $346, which then it reduces the Army's cost from the original $101,000. to 100,654 because the Department of Army takes away from the contractor the personal property tax refund and the contractor's net gain over what he would have got doing the same job for the private sector is only the difference between 100,194 and the figure we had on Exhibit 12, the 99,806. So as a result of the tax really the Department of Army or the U.S. or local government ends up paying the contractor's corporate income tax for him.

Q. And again in an effort to find out the cost to the
(Tr. 290)
Federal Government, which is one of the things that appears on Plaintiff's 14, we should take a series of refunds over — not refunds — but sources of revenue to the United States representative of the various categories

on Defendant's Exhibit B, should we not? A. In each situation he'd pay the same Federal taxes.

Q. And such taxes would then end up in the general fund of the United States? A. Yes.

Q. All arising by virtue of the letting of the contract? A. Under this hypothesis, yes. In this 14, however, the State Treasury, which is noted, gets to keep the unrefunded portion of the Federal monies or the local government monies. This $460. down there become a plus to the State. So Federal contractors subsidize the State Treasury.

Q. That's the same $460. that we have been tracing through here on these exhibits? A. Yes.

MR. POORE: I believe that's all we have. Thank you, Mr. Templeton.

Examination by the Court of Mr. Templeton:

Q. I'm still not quite sure about this private owner chart of yours. The private contractor you show as getting a net out of the contract of $99,806. and I can see how

(Tr. 291)

that comes out. But when you start comparing it with your Exhibit 14 I don't quite see how it does because here you've got $100,000. contract and there you have a contract for $101,000. A. But the only difference, Your Honor, is the one percent tax.

Q. I know that. A. So if we didn't have the one percent tax we'd all be awarding $100,000. contract and when the contractor got done he'd be transmitting a check to the State for the corporate tax of $194. and so because of the tax refunds and credits approach, really the contractor gains on both.

Q. But you don't have an arrow showing the payment of that $1,000. in here, as I see it. A. Yes, on Item 14 we do, the tax payment $1,000, the very top arrow from the contractor to the State Treasurer. The State law, sir, says that the awarding agency is supposed to withhold. None of the Federal Government agencies do. So the law further provides, as I read it, that the contractor is obligated if we don't withhold the $1,000. and transmit it to the State, the contractor makes the payment instead of the Federal Government and a lot of times instead of a local agency that doesn't understand the tax. So that's why the $1,000. The

(Tr. 292)

$1,000. goes to the contractor and the $1,000. then goes from the contractor to the State Treasurer. Now if the United States Government was following the regulations of the State Revenue Department and we remitted the one percent to the State, our ledger for that project would still show $101,000. because when we issued a check to the State we would charge it to that project.

Q. Well, that may answer it.

PHILIP MARONICK

(Tr. 296)

Called as a witness, duly sworn, testified as follows:

(Tr. 297)

Examination by Mr. Cosgrove:

Q. Would you state your name for the court? A. Phil Maronick.

Q. Where do you reside? A. East Helena, Montana.

Q. And what is your present occupation? A. I am a contractor.

Q. And for whom do you work? A. Maronick Construction Company.

Q. And what is your position with Maronick Construction Company? A. I am the president of Maronick Construction Company.

Q. Could you briefly give the court a little background with respect to your educational background after high school? A. Yes. I have a degree in economics from the University of Notre Dame and a degree in civil engineering from Montana State University.

Q. How long have you been working in the construction industry? A. Approximately all my life.

Q. How long has Maronick Construction Company been operating? A. Maronick Construction — about 18 years.

Q. Have you been with it all that time? A. Yes, I have.

(Tr. 298)

Q. Now your present title is president and general manager, did you say? A. Yes.

Q. And what really do your duties entail? A. We are a small company so my duties entail just about everything that goes on in the company. I oversee our office work as well as all our supervisors. I do all of the bidding and some of the dirty work too.

Q. Do you have people that work for you that give you information when you are estimating and making your final bid, they supply the information you need in compiling the bid — A. Yes.

Q. — any people in your office? A. Yes. We don't have an estimator per se.

Q. Do you have field supervisors that provide this sort of information to you? A. Yes.

Q. Are you the sole owner of Maronick Construction Company? A. No, my father is also an owner.

Q. Do you have a substantial investment in it? A. I own approximately 80 percent.

Q. 80 percent? A. It's in that range.

Q. Now what type of work, construction work, does Maronick

(Tr. 299)

Construction Company do primarily? A. Generally speaking heavy highway.

Q. And has that been true throughout the entire history of your company? A. Yes, it has.

Q. Now you mentioned briefly a few minutes ago that you do get involved in the bidding procedures of Maronick Construction? A. Yes, I do.

Q. Who makes the final bid? A. I do.

(Tr. 301)

Q. I believe the statement was made earlier today that bidding is a pretty precise science. Would you agree with that statement? A. Oh, I would have to disagree with that entirely.

Q. What would your statement be with respect to the science or the art of bidding?

(Tr. 302)

A. Well, I think the actual cost system can be precise but the actual determination of what the job is actually worth, there are so many contingencies in every job and so many things that you cannot actually determine and you are taking a risk in a great many jobs and this is your calculation, how much do you put on that risk.

Q. What you have called the risk factor? A. That's what I call it, yes.

Q. You've been around bid openings, I take it? A. You bet.

Q. And you have probably seen variances between the high and low bids on any job? A. Yes, I have.

Q. What can that vary or what has that varied in your experience? A. Well, it will go between — between the high and the low it varies as much as 50 percent.

Q. 50 percent? A. That's right.

Q. It's hard for me to understand. I would think that you know the direct costs, for example, on equipment. I mean an earth mover costs everyone about the same or gasoline costs everyone about the same. How can one contractor be 50 percent higher than another? A. Well, I think a lot depends on how badly you want the job

(Tr. 303)

and your circumstances at the moment. Do you have equipment enough to handle the job. Is your equipment sitting there. Does it fit in this particular job. These are all variables among different contractors.

Q. So it goes back to the inexact science of bidding? A. That's the way I see it.

Q. Now, you are, of course, familiar with the taxes that your company pays in Montana? A. Yes.

Q. When you are preparing your bid or working on your estimate and you are going to bid a job for a public agency, what taxes do you consider? A. All applicable taxes. Property taxes, fuel taxes.

Q. Ok. Let's take them one at a time. What would you estimate your property taxes on, your personal property? A. Yes.

Q. On your equipment? Where would you figure that in? A. Direct cost.

Q. You estimate or figure what the rate will be? A. Yes.

Q. In your experience has it been difficult to estimate what that rate will be? A. Yes.

Q. Now you mentioned gasoline tax. Do you figure in something for what gasoline tax you might have to pay? (Tr. 304)

A. Yes.

Q. Where would that be? A. In the direct costs.

Q. Under which item? A. This would naturally apply to the rental rate of a piece of equipment, let's put it that way.

Q. Would that be as on the property tax, the rental rate on that piece of equipment? A. That would go directly to that individual piece of equipment.

Q. And that cost would then — or those taxes would then increase the cost to the project? A. Yes.

Q. You are familiar with the Montana gross receipts tax? A. Yes.

Q. And with the offsets and credits? A. Yes.

Q. When you are figuring your estimates what do you include for the gross receipts tax? A. I do not take into account the contractor's gross receipts tax.

Q. You include nothing for it? A. That's correct. In our experience with our company we find that it

comes very close to washing itself out and, consequently, it's an inconsequential cost.

(Tr. 305)

Q. And so you simply add nothing in? A. That's correct.

(Tr. 307)

Q. Now if you were bidding a project for the State of Montana or any public agency or the Federal Government, take, for example, that you have a construction project that is going to cost $100,000. If that is being awarded by the Federal Government or the county of Missoula would that affect how much or would that affect what your bid will be, who is awarding that contract? A. No, it wouldn't.

Q. It isn't any more or any less to you because it is let by the State of Montana — A. No.

Q. — or the Federal Government? A. No.

(Tr. 308)

Q. This tax went into effect in 1967. Have you had any 100 percent Federally funded jobs since the inception of this tax? A. Yes, we have.

Q. And where was that? A. The highway project on McDonald Pass.

Q. That's outside of Helena? A. Yes.

Q. That was 100 percent Federally funded? A. Yes.

Q. Who was the contract awarding agency? A. The Federal Highway Administration.

Q. Now what year was that job? A. 1973.

Q. On that particular job did you work on preparing the final bid that was submitted? A. Yes, I did.

Q. And did you include anything in that job for the contractor's gross receipts tax? A. No, I did not.

Q. Do you know of your own knowledge if that contract you had with the Federal Highway Administration required you to pay over any refunds or credits which you might receive under the tax to the awarding agency? A. No sir, it did not.

(Tr. 309)

Q. It did what? A. It did not require us to pay any refund.

Q. Did that contract have a provision in there stating to the effect that you must include or you must be able to pay all your own taxes that are applicable to you in Montana? A. Yes.

Q. And you included nothing for the contractor's gross receipts tax? A. That's correct.

Q. Now, Mr. Maronick, we have been — you might have heard during the testimony today that the Federal Corps of Engineers includes in their contracts a provision which requires the contractor to pay over in some instances merely the personal property tax and in other instances both the personal property tax and the corporate license tax to the Corps of Engineers. Now if you on your Federal Highway Administration project had faced or had such a provision in your contract, would that have made any difference in your figuring your contractor's gross receipts tax? A. Yes, I think it would. I think I would include that as a cost factor.

Q. You would include what? A. That refund.

ROBERT McINTYRE

(Tr. 324)

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Cosgrove:

Q. Would you state your name for the court, please? A. My name is Robert B. McIntyre.

Q. Where do you reside? A. In Great Falls, Montana.

Q. By whom are you presently employed? A. McIntyre Construction Company.

Q. Where is that located? A. In Great Falls, Montana.

Q. And what is your position in the McIntyre Construction Company? A. I am president of McIntyre Construction Company.

Q. Would you give the court the background of your education after high school? A. I attended Montana State University and graduated in the winter of 1966 with a degree in geology.

Q. Have you had postgraduate work? A. I have not.

Q. How about some of your work experience?
(Tr. 325)
A. I have since — in 1961 I worked as a temporary summer employee on highway construction and in 1967 I went to work for S. Birch, Inc., a highway contractor out of Great Falls.

Q. What was your position with them? A. I was an estimator.

Q. And as such what sort of estimating were you doing? A. I was estimating all construction work that they were doing at that time.

Q. What kind of contractor is S. Birch? A. A heavy highway contractor primarily in the construction of highways.

Q. Now that was up to 1971? A. 1970. In 1970 we formed McIntyre Construction Company and I became an employee of McIntyre Construction Company in that year.

Q. And what were your duties with McIntyre Construction? A. I am general manager and in charge of all their construction work.

(Tr. 333)

Q. Now you have mentioned that you have a factor for taxes and bond; is that correct? A. Yes.

Q. Now which taxes were you talking about in this? A. I'm talking about the Montana gross contractor's tax.

Q. And not the property or the gasoline tax, for example?
(Tr. 334)
A. No. Those taxes are in our equipment rental rates. They're included in the equipment rental rates.

Q. As a direct cost? A. Yes.

(Tr. 337)

BY MR. COSGROVE: Q. Why don't you include the one percent tax, you know, straight across the board at one percent? A. Because of our credits allowed on personal property tax, which that portion of our costs is included elsewhere in the bid.

Q. And historically it's been ¾ of one percent? A. Our rates have historically been a little less than that. This is the figure we are using in our estimating.

Q. If you were looking at a job that, say for example, was worth $100,000. and going to be let by the State of Montana or the Federal Government, because it is let by

either the Federal Government or the State of Montana, would that affect the price of your bid? A. No, it would not.

Q. You don't bid any less knowing it's going to the State of Montana? A. No.

Q. The contractor's gross receipts tax went into effect in 1967. Since that time has your company been involved in any 100 percent Federally funded projects? A. Yes, we have.

Q. Where was that? A. It was a Safeguard Missile access road by Conrad, Montana done for the Federal Highway Administration.

(Tr. 338)

Q. For the Federal Highway Administration? A. Yes.

Q. On that job did you work on preparing the bid for that job? A. Yes.

Q. Did you make the final bid on the job? A. Yes.

Q. On that job what did you include for the contractor's gross receipts tax? A. I don't recall the effective rate we were using right at that time.

Q. Well, did you include one percent across the board? A. No. We tried to equal one percent with our personal property tax and our allowance for gross contractor's tax combined.

Q. So you attempted to figure the net tax? A. Yes, we did.

Q. Now do you know if that contract had any provision in it requiring that any refund you receive from personal property tax credits or personal property taxes

be turned over to the awarding agency? A. It did not have any such clause.

Q. It had none? A. No.

Q. Now assume for the moment, Mr. McIntyre, that the contract had such a clause. Would that have made any difference to
(Tr. 339)
you in computing the one percent gross receipts tax? A. Yes, it would have.

Q. How? A. The way we would handle it would be to include instead of the effective tax rate of ¾ of one percent that we've been using, we would use the straight one percent and keep our personal property taxes just as they are.

Q. And it would only be because of that provision that that would change the way you operate right now? A. If we had to give back a portion of the money that we had been using as a credit, that portion would become a cost to us and we would cover it in the way that I mentioned.

PHILIP HAUCK

(Tr. 381)

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Poore:

Q. Would you please state your name to the court? A. Phil Hauck.

Q. Where do you reside, Mr. Hauck? A. In Helena, Montana.

Q. What is your business or profession? A. I work for the State of Montana. I am an architect.

Q. And are you a duly licensed architect in the State of Montana? A. Yes, I am.

Q. At the present time you are in the employ of the State of
(Tr. 382)
Montana? A. Yes.

Q. And what is your position or title? A. I head the Office of the State Architect.

Q. Prior to your taking that office or position were you at any time engaged in private practice? A. Yes, I was. Prior to my coming with the State of Montana I was in private practice.

Q. As an architect? A. Yes sir.

Q. And where geographically were you practicing at that time? A. In Great Falls.

Q. Were you a member of an architectural firm? A. Yes, I was.

Q. Would you state the name of the firm? A. The name of the firm was Bordeleau, Amundson and Hauck, Architects.

Q. How long did you practice in a private capacity? A. Approximately ten years.

Q. Would you summarize just briefly the scope of your professional experience as a private architect? What types of construction were you an architect on? A. Primarily work in the private sector, mostly schools, office buildings and commercial buildings. We did do a little work for the Federal Government and the State
(Tr. 383)
Government.

Q. And would your experience as you have outlined it in that type of work, would that include the phase of drawing plans and specifications? A. Yes.

Q. And inspecting building sites? A. Yes.

Q. The drafting of such plans and awarding or bidding on contracts? A. Yes.

Q. And supervision in the performance of contracts? A. Yes.

Q. And completion and delivery of the final project to the owner? A. Yes.

Q. Now after you terminated your private experience then you went with the State of Montana. Now would you describe to the court the nature of your office as State Architect? What are the areas of work for which you are responsible, Mr. Hauck? A. Generally we handle all the building construction for the State. This includes buildings at all the State Institutions and Universities. Specifically we do budgeting and programming, contract administration, supervision and keep the — pay the bills and keep the
(Tr. 384)
books on the projects.

Q. And what is the staff of your office? A. Well, I have architects and engineers and inspectors and accountants.

Q. Where is your office located? A. In Helena.

Q. Then if a building were to be built out here at the University of Missoula, an addition to the Law School or something like that, could I reasonably expect that that work would be done with some involvement of your office? A. Yes, we'd be completely involved in it.

Q. Now in the conduct of your duties for the State of Montana, are you ever involved in projects where there is Federal funding? A. Yes, quite extensively. On many of our projects there is Federal involvement in the way of participation cost wise. In fact we deal —

Q. Would you give us a list of the Federal agencies that you would expect to have some relationship with through the years? A. There's quite a number of them. I jotted down 12 I could read off if you'd like me to.

Q. Yes. A. The Public Health Service, Office of Education, National Guard Bureau, Veterans Administration, Bureau of Outdoor

(Tr. 385)

Recreation, Federal Aviation Agency, Department of Agriculture, Law Enforcement Agency — I'm not sure of the full name of that one — they call it LEAA, the Department of Housing and Urban Development, the National Science Foundation, the Department of Labor and the Department of Transportation.

Q. Now have you been waiting as a witness in the wings, so to speak, for testimony in this case and specifically were you here during the testimony of Mr. Templeton? A. Most of it.

Q. I'm going to, with you hypothetically build a building that Mr. Templeton hypothetically referred to in his Plaintiff's Exhibit #11 involving the State Government and —

THE COURT: Let me see 11, would you please?

BY MR. POORE: Q. Mr. Hauck, if we hypothetically built a new law library in Helena, Montana initially at least with only the State of Montana money, is that

the type of a project that your office would be actively engaged in? A. Yes.

Q. Does the term "awarding agency", does that have significance to you? A. Yes. We call it a contracting office, but it's the same thing.

(Tr. 386)

Q. Would it confuse you to consider — to use the term "awarding agency"? A. No.

Q. Now if there appears to be a need for a Supreme Court Library, who would the awarding agency of the State of Montana be? A. It would be my office acting through the Board of Examiners.

Q. All right. What would be the very first step in getting this project going and then we'll trace it through and get it completed. What is Step #1? A. Well, starting with the fact that the need has been established we would then include this in the building program that would be submitted to the Legislature. We would make an estimate to establish the cost. If the Legislature looked favorably upon the project, they would make an appropriation from some source of money. Most of the State buildings, the money is derived from the cigarette tax.

Q. Let's assume that there is an apparent need and that the Legislature approves it and awards a fund of $101,000. for the building of the Supreme Court Law Library. A. Once this appropriation was made we would enter this into our books as a project of $101,000.

Q. Would the project have a number?

(Tr. 387)

A. Yes. It would be given a title and a number for accounting purposes.

Q. Could we give the project a title? What would you call it? A. Just law library, or something, some descriptive wording. It would also be given a number for accounting purposes.

Q. Could we say 1234? A. Fine.

Q. Now in Plaintiff's Exhibit 11 there was an awarding cost of $101,000. Let's try and end up with that. What would you do as soon as the Legislature had funded a project and you had established the project? What would be the next step through your office under your supervision? A. Well, we would employ a professional architectural firm to do the design of the project. This would be a charge against the $101,000. When the design was completed and approved by all parties concerned we would start an advertisement for bids and upon receiving bids we would open them. The project would be awarded to the lowest responsible bidder and construction would commence.

Q. Would all of that be done under your supervision and control? A. Yes.

Q. Including the reviewing of the bids, the formulation of plans and specifications, the advertisement and the
(Tr. 388)
selection of the lowest responsible bidder? A. Yes.

Q. To enable us to dove tail this to Plaintiff's Exhibit 11, could we allow — I know some expense has been incurred with the architect — but could we have an awarding cost of $101,000? A. Yes.

Q. Can we assume that upon the granting of that contract for $101,000. the law library project #1234 has a project fund of $101,000? A. Yes. We'd have

to be assured that we had the money in that account before we ever signed the contract.

Q. So having assured yourself that the money was there, knowing that this is a public project that you've been told to go ahead with, you award a contract. Now let's assume this just for ease of arithmetic. I get so confused on this. The contractor enters upon the performance of his task and is paid ten successive payments over the period of time that he performed the contract. Is that consistent with the practice in your office? A. Yes.

Q. Again for illustrative purposes to the court, for my own ease would it be convenient to have at least the first nine payments equal $10,000? Would that be consistent?
(Tr. 389)
A. Yes.

Q. As an actual fact would you tell the court how if I am the contractor working on the law library project in Helena and have performed a couple of months of work, what would you expect from me as concerns obtaining some money? A. The contractor would submit a pay request or request for payment to the architect who would certify that the contractor had completed that amount of work and is satisfactory. We would review this and if we found it in order we would approve it for payment. We would deduct this one percent sales tax (sic) and we would [illegible] it to the contractor his check and we would transfer to the Department of Revenue the one percent.

Q. You may have just misspoke yourself. You said sales tax if I heard you right. Were you referring to—
A. The gross receipts tax.

Q. All right. So payment number one we are hypothetically going to say is $10,000. Now you already anticipated me there a little bit. Does the $10,000, the full $10,000. go to the contractor? A. No. It's reported in our books as a $10,000. payment —

Q. All right. And what becomes of the — A. — minus the one percent —

Q. All right.
(Tr. 390)
A. — which would be $9,900. would go to the contractor and $100. would be transferred to the Department of Revenue.

Q. So the full $10,000. payment would have been split the way you just said. Now we are certainly not going to bore the court with the obvious. The ten payments, would they be made similarly as the project went along, and let's assume in a smooth manner? You are nodding yes but you'll have to speak up. A. Yes.

Q. So I'll make those lines that are supposed to indicate something happened. Now we get down to payment number ten and again assuming that they are all equal, would it be $10,000? A. Well, it would be $11,000.

Q. I'm sorry, I guess I — $11,000. Would that payment be split again between the contractor and the Department of Revenue? A. Yes.

Q. Would the Department of Revenue get $110? A. It would get $110.

Q. And the difference would go to the contractor? A. Yes.

Q. I'm not that good on arithmetic and I don't want to be wrong here. All right now, in the course of this you

(Tr. 391)
testified that — or have you? Are you familiar with the operation of the Montana Gross Receipts Tax Act? A. I am.

Q. As concerns contractors performing work for the State of Montana either under wholly State financed or Federally and State financed projects? Is it part of your duties and responsibilities to administer the Act insofar as payments to contractors are concerned? A. Yes.

Q. Are you aware of the provisions in the Act for personal property tax refunds and income tax credits? A. I am aware of them.

Q. Let's assume, as did Mr. Templeton, that this contract is performed by a corporation and that it is profitably performed; that it had equipment in the County of Lewis and Clark such that there were taxes levied upon the equipment amounting to $346. and let's assume that — would that be consistent with what could happen in an actual case? A. I believe so.

Q. And let's assume he presented, as the testimony has shown, proof of such payment at the Department of Revenue and received a payment from the Department of Revenue, a cash payment of $346. In your experience is that property refund, does that come back and be credited
(Tr. 392)
against this project in any way? A. No.

Q. Following along with Mr. Templeton's hypothetical State Government project, if we assume that the project takes approximately one year and that the contractor incurs some Montana corporate license taxes and claims a credit of $194, is that again consistent with what you have noted with the projects that there could be such a credit? A. There could be, yes.

Q. Now have you ever in your experience administering the Act received and credited to our — to a similar law library project any part or portion of such a hypothetical corporate income tax credit? A. No.

Q. Now you have paid over or on behalf — on this law library project the total amount of withheld Montana gross receipts tax in the amount of $1,000, have you not? A. Yes.

Q. At least that is what we intend to follow along — A. Yes.

Q. — on the hypothesis that was represented in Plaintiff's Exhibit 11. In your experience has the Department of Revenue, pertinent to a similar project and specifically our hypothetical law library project, ever remitted or
(Tr. 393)
paid over to your office any payments or portions of payments of the gross receipts tax that have been paid to them? A. No it never has. You might correct that. That is supposed to be 1,000 instead of 100,000.

Q. Thank you, Mr. Hauck. Now as that contract is performed and these monies are expended, am I correct in assuming that the fund in the — the project fund 1234 reduces? A. Reduces?

Q. As you pay these monies out of this fund do you gradually deplete the law library project fund? A. Oh, yes.

Q. These are warrants issued on the project fund and paid out and deplete the fund gradually? A. Yes.

Q. Now from the way I've taken you through it so far would it be correct that at the end of the completion of the project we would have paid out the $101,000. award cost? A. Yes. We'd have to balance to the contract amount.

Q. You have to balance to the contract amount so that the total payment from the project fund is $101,000? A. Yes.

Q. And of that, how much would have been paid to the contractor? A. 100,000.

(Tr. 394)

Q. How much would have been paid to the Department of Revenue? A. A thousand.

Q. Now what would be the cost to your department of the law library project? What would you show as the cost of that? A. We would show $101,000.

Q. Would you show any credits received from the Department of Revenue? A. We'd never receive any.

Q. From any contractor? A. We'd never receive any.

Q. From any source whatsoever? A. If there was any credits to be made from some other source we would show it as a credit.

Q. If it was a joint effort with the Federal Government in some manner? A. There's a remote possibility.

Q. Let's assume that the same project was built with some form of matching Federal funds. Without boring the court on the details of that, could you just summarize what if any differences there would be if matching funds, say, on a fifty fifty basis were involved?

MR. STRATTON: I would like to make a technical objection. If defense counsel is using our hypothetical
(Tr. 395)
on Plaintiff's Exhibit #11, it was testified that the column pertaining to the United States was an example

of an Army Corps of Engineers project and the witness also testified that other Government agencies might do it differently, especially in a case where there are matching funds. So if defense counsel is going to use a hypothesis I believe that he would have to use a new column to illustrate that point rather than using our column.

THE COURT: Well, with your explanation this will show what is done I think. Go ahead.

BY MR. POORE: Q. The question I intended to ask you was would the expenditure of funds, the process you have outlined, be different if there was an infusion of, say, Federal monies of 50 percent into the hypothetical project? A. The fact that there was Federal participation in the project, we would do nothing differently. It would still be reflected on our books as a $101,000. project.

Q. If the Federal participating funds were truly 50 percent would you have actual dollar contribution to your $101,000. fund of one half of $101,000. or $50,500. from the Federal Government? A. Yes.

Q. And then once that infusion of funds was established the
(Tr. 396)
pay out would be the same, or would it? A. It would be the same.

Q. And the cost to the State of Montana on this particular project #1234 for the law library building in Helena, Montana would be what amount, sir?

MR. STRATTON: I object, Your Honor. The witness testified the cost to his particular agency, not to the State of Montana.

MR. POORE: And I asked to the State of Montana.

MR. STRATTON: I don't believe the witness is qualified to tell about the cost to the State. He can only tell about the cost to his particular agency.

THE COURT: Overruled.

BY MR. POORE: Q. What is the cost, Mr. Hauck? A. It would be $101,000.

Q. Now shifting over to a different area of your expertise, again so as to not unduly lengthen your examination or your testimony, based upon your experience in both the public and the private sector of construction work, your experience in building public buildings for the State of Montana with both solely Montana funds and Federal and Montana funds, could you summarize for us what differences, if any, you note in the awarding and performance of a public contract versus a private contract where the two contracts are substantially the
(Tr. 397)
same as concerns the hypothetical project being constructed? If we could again use a law library project hypothetical and a private library for the Anaconda Company, now would there in your opinion or in your experience be any differences from the beginning of the letting of the contract right through to the end and if so could you lead us through and point out such differences? A. Well, generally speaking in the public sector of contract administration —

Q. Could you speak just a little bit louder, please? A. In the public sector of contract administration there are many laws and rules and regulations that are promulgated by legislatures or bureaucratic officers that tend to make the public contracting much more cumbersome and involved, much more paper work, much more detail in the line of justifications and documentations and audit trails and this type of thing and, as far as I am

concerned, tends to make public contracting more cumbersome, more time consuming and with the ultimate result of a higher project cost. In the private sector things are much more streamlined and unrestricted and, consequently, I think that most contractors agree, or at least they have told me, they would prefer to bid. It's much simpler to bid on

(Tr. 398)

construction in the private sector than in the public sector. Now there are many things that contribute to this. The laws require contractors to provide bonds, for example bid bonds and performance bonds and payment bonds. They require full coverage of every conceivable kind of insurance.

Q. Now are you talking about public or private? A. The public sector. These are required by laws and regulations.

Q. Bid bonds, payment bonds and what is the other type? A. Performance bonds.

Q. And are those required in the private sector? A. They are not required. In fact it's up to the owner whether he wants them or not. They do involve costs and many owners because of the cost, if they are familiar with the contractor and his financial stability and a few things like this, they will ignore that type of thing. Anyway, it's an optional thing in the private sector. It is not optional in public contracting. Public contracting requires competitive bidding and awards to the lowest bidders. In the area of insurances, they require all kinds of liability insurances and property damage, workmen's compensation, fire and extended coverage and all these add additional cost to projects. That again is optional in the private sector.

(Tr. 399)

Q. Jumping back to the competitive — the award to the contractor, the lowest responsible bidder, is that required in the private sector? A. No, it's not. In fact I would estimate from my experience that probably more work is done in the private sector not bidding or not doing it on a competitive bidding basis. They use time and material contracts. They use negotiated contracts. They invite only those contractors to give a price — if they do bid, they do it by what is called bidding by invitation only. This is not allowed in the private sector (sic). There are ways that they can control the costs on their projects in the private sector that are not available in the public sector because of rules or regulations or laws.

Q. You then were touching on insurance when I interrupted you, Mr. Hauck. A. I think I said everything I want to say about insurances. Public work also requires licenses for private contractors. It's another job cost. In the public sector many times they put in the contract document stipulations for liquidated damages, warranties and guaranties. The contractors are aware of the fact that in the public sector the supervision criteria are far more stringent. The contractor is allowed no latitude of his own. He is

(Tr. 400)

literally led through the project. These type of things in my estimation tend to add costs to public contracting that are not prevalent in private contracting. Just the paper work blizzard that has evolved in the last few years in public contracting is an awesome thing to a contractor. An example of that might be on change orders. The State requires six copies of all change orders. If there is any Federal involvement we require

eight copies of change orders. The contractor has to prepare all these. The justification and documentation that is required to satisfy everybody concerned with the change order is getting to be voluminous. Just the signatures required. On a typical change order in Montana it requires seven signatures just to get it approved. This causes time delays and time is money to a contractor especially if he has to provide interim financing while waiting for payments on his monthly pay requests on change orders. Does that answer your question?

Q. Yes, I believe it does. Well then, do you believe there is a real and substantial difference between public contracts, the letting, awarding and performance of public contracts, as opposed to the private contracts? A. I would say administratively and legally in my opinion there is a pretty wide break between the two.

Cross-Examination by Mr. Stratton of Mr. Hauck:

(Tr. 405)

Q. Now have you ever worked for the Montana Treasurer? A. No.

Q. So in your hypothetical, Defendant's Exhibit C, I believe — is that correct?

MR. POORE: That's correct.

BY MR. STRATTON: Q. Once you pay, I guess it is on your hypothetical, the $1,000. to the Department of Revenue, you don't actually know what happens to that $1,000. when it is paid? A. No, I don't.

Q. You don't know what the Department of Revenue does with that money? A. No.

Q. And you have no knowledge of the internal auditing of the Treasurer of the State of Montana? A. I

know they do an internal audit and that's about the extent of it.

Q. You have no idea of the internal workings of the State Treasurer? A. No.

Q. So then when you testify to the cost you can only testify as to the cost to your agency, not to the State of Montana, is that correct — A. Well —

(Tr. 406)

Q. — as far as the internal auditing procedures? A. As far as auditing procedures, yes.

Q. Would you like to explain then? A. I was going to say that we in our contracting and accounting on construction jobs are acting on behalf of the State of Montana.

Q. I'm sorry? A. I say in our job of contracting office for the building program, we are acting on behalf of the State of Montana.

Q. I see. But that is just within the scope of your agency? A. That's true.

Q. Would an example of a large private construction project include shopping centers, department stores and bank buildings? A. Yes.

Q. Would an example of a large public construction project include a United States Post Office or a G.S.A. office building? A. Yes.

Q. Now considering for the moment the private buildings that I cited and the public buildings that I cited, is the public project intended for the use of the public? A. Yes.

Q. Is the private project intended for the use of the public?

(Tr. 407)
A. Yes.

Q. So far as the use of the public is concerned, there is no difference between private and public — A. No.

Q. — construction? A. No.

Q. Now assuming the Federal G.S.A. building, would the State of Montana in any way regulate the use of the G.S.A. public building, United States Government building? A. The use?

Q. Yes. A. No.

Q. Now assuming again you have a United States Government G.S.A. office building, if it is inadequate in some way, wouldn't it expose the public to danger? A. Yes.

Q. If a private project were inadequate in some way, would that not expose the public to danger? A. Yes.

Q. And wouldn't the Federal Government without any supervision usually take corrective steps if there is inadequacy in their buildings? A. I would assume so.

Q. Now consider the Federal construction project, a G.S.A. building or post office. Would the State of Montana in
(Tr. 408)
any way interfere with or review the qualifications and experience of the contractor performing the project for the United States? A. Not that I am aware of.

Q. In the performance of a public project you testified that sometimes bonds are required. Is it true in the performance of private construction projects of large dollar volume that sometimes bonds are used? A. They might.

Q. Is it also true that a building that might be constructed for a private corporation or private individual may be leased to a public agency? A. That happens quite often.

Q. It happens quite frequently? A. Yes.

Q. Do you recall having your deposition taken on the 4th day of December in Great Falls, Montana? A. Yes, I do.

Q. Do you have a copy of that deposition?

MR. POORE: I do. And I don't believe there are any markings on it. This copy has Mr. Hauck's name. Is that the one?

MR. STRATTON: Yes.

Q. To be brief and to the point, on Page 11 on Line 8 I asked the question, the difference between
(Tr. 409)
100 percent Federally funded projects, your personal knowledge of those projects, and private projects would your knowledge have to be pure speculation as to the Federal projects? A. The 100 percent pure Federal projects, yes.

Q. On Page 15 I asked the question is not the Federal Government itself a self insurer. A. I would assume so on a hundred percent Federally funded project. However, on projects involving Federal participation we put the insurance as terms of the contract.

Q. On Page 37, Line 23, as to Federal codes, building codes, I asked the question referring to the United States I asked the question perhaps the United States meets even more stringent codes, would you say? Would you tell me what your answer was? A. I said that they could be.

Q. Then again on Page 45, Line 16 the question was "So that you wouldn't know of any differences, then, between these 100 percent Federally funded construction projects, and private projects, would you?" and please read your answer. A. The answer was yes.

Q. Is that your testimony today as well? A. Yes.

(Tr. 410)

Q. Then on Page 49 I asked a question concerning tax classifications. At Line 21 your answer, please?

MR. POORE: Could you ask the question for the record so we know?

BY MR. STRATTON: Q. I asked a question concerning "Do you think those differences merit a difference in tax classification?" That was on Line 17, Page 49. Your answer is at Line 21, sir. A. The answer is "Well, I don't feel that I am qualified to talk on tax classifications."

Q. Is that your testimony today as well? A. Yes.

Q. Then on Page 55, Line 9 you answered ". . . but I deal strictly with the State building program." Is that correct? A. Yes.

Q. Then on Page 57, Line 19 referring to the Federal Government I asked the question "Do they actually tell you how to administer these contracts, and so on?" At Line 21 would you please read your answer? A. "Pretty much, yes . . ."

Q. "Do they tell you how to supervise, and how to inspect?" Referring to the Federal Government on partially funded Federal projects that you work on. Would you please read your answer on Line 24?
(Tr. 411)
A. On Line 24 I said "Yes. . . ."

Q. Is that your testimony today, sir? A. Yes.

MR. STRATTON: I have no further questions, Your Honor.

THE COURT: Redirect?

MR. POORE: Yes, Your Honor.

Further Examination by Mr. Poore of Mr. Hauck:

Q. Mr. Hauck, is there any requirement in your office for the insurance of public properties, the carrying of insurance on properties that your office supervises or builds? A. We maintain insurance on all State properties.

Q. As to this hypothetical law library project, would this project be insured through your office for replacement insurance, fire and extended coverage? A. This would be entered in at the price of $101,000.

Q. Is there any requirement in your office for the listing of private properties in dollar values? In other words, an inventory of properties? A. You mean State owned?

Q. Yes. A. Yes.

Q. What would this project #1234 be valued at in your office? A. Well, again upon completion it would be entered at the
(Tr. 412)
value of the contract or $101,000.

Q. And is there any requirement through your office of establishing and setting up a depreciation schedule on State of Montana buildings? A. We carry a depreciated value insurance so after the building is entered

into the insurance file or insurance records of the State, they start a depreciation schedule.

Q. And what would this building be started at on this schedule? A. It would be entered at $101,000.

Supreme Court of the United States

No. 77-1134

MONTANA, ET AL.,

Appellants,

v.

UNITED STATES

APPEAL from the United States District Court for the District of Montana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 22, 1978

A true copy Michael Rodak, Jr. Test: Clerk of the Supreme Court of the United States by Frances J. Corfon, Deputy.

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